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OF THE LANGUAGE OF THE LAW NEED NOT BE
PECULIAR AT ALL. AND BETTER FOR IT."

THE LANGUAGE OF THE LAW
BY DAVID MELLINKOFF

THE
HISTORY OF
THE
CITY OF
NEW YORK
FROM
1609 TO 1898

07-ASS-0350

BACON'S
ABRIDGMENT.

By GWILLIM.

VOL. IV.

14937/4

W. E. B. DUBOIS

THE PHILANTHROPIST

OF THE FUTURE

BY

Chanc. Law
NEW
A BRIDGMENT

OF THE
LAW.

By MATTHEW BACON,
OF THE MIDDLE TEMPLE, ESQ.

THE FIFTH EDITION, CORRECTED;
WITH CONSIDERABLE ADDITIONS,
INCLUDING THE LATEST AUTHORITIES;
By HENRY GWILLIM,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

IN SEVEN VOLUMES.
VOL. IV.

LONDON:

PRINTED BY A. STRAHAN,

LAW PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

For T. Cadell, C. Dilly, G. G. and J. Robinson, J. Johnson, R. Baldwin,
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1798.

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Leases and Terms for Years.

A LEASE for years is a contract between lessor and lessee, for the possession and profits of lands, &c. on the one side, and a recompence by rent, or other consideration, on the other. [1 Term Rep. 598-9.]

This is esteemed in law a middle kind of interest between an estate for life and a tenancy at will; for those who held large districts and tracts of lands, being unacquainted with the arts of husbandry and tillage, found it their interest to lease out their demesnes, which for want of care and cultivation lay waste, and afforded them little or no profit; and this way of letting for years was thought best to answer the design and intentions of the lord, as well as the expectations of the tenant; for if they had let them for life, this had given the tenants too great a power over the lord, because then they would have had a property in the freehold, and by suffering disseisins, or feigned recoveries to be had against themselves, might have shaken or endangered the inheritance of the owner; and on the other side, if they had leased their land only at will, few would have been willing to bestow any great pains or industry upon so precarious a possession, which the arbitrary will and pleasure of a peevish lord might have defeated. Spelm. Rem. 2.

Originally, leases for years were but of little regard, the tenant having only *utile*, not *directum dominium*, and being said *tenere nomine alieno*: and as he had only the perception of the profits, whoever recovered the freehold reduced likewise the possession, whether such recovery were true or feigned; and the lessee had no other remedy but an action of covenant against the lessor; and this, at least, was thought a just construction, that he who had divested himself of the profits of his lands for a time, by giving them to another, should be obliged to maintain that gift, or be liable to make satisfaction if he did not; and this was the more reasonable, because the lessee was equally bound to answer and make good the rent during the term; and if he did not, the law allowed the lessor to maintain an action of covenant, as well as of debt against him, for withholding thereof; and as it made this construction for the lessor upon the words *yielding* and *paying*, which were no express covenant in themselves, it was but reasonable it should make the like construction for the lessee upon the word *dimisit*, which in itself no more imported an express covenant on his part: but by making this construction mutual, the courts did justice to both; and by making it at all, they plainly

Vide tit. Covenant, and Salk. 137. pl. 1.

(a) Therefore, if a lease be made to a bishop, abbot, parson, or any other

shewed their opinions of the lease to be no other than a contract or agreement between the parties, and not such an act as transferred any property to the lessee: and this is one reason why leases for years are considered as chattels, and go to (a) executors.

sole corporation, and his successors, for such a number of years, yet it shall go to the executors or administrators of the lessee, and not to his successors, because a term for years being looked upon as a chattel, the executors or administrators are the only persons the law allows to succeed thereto; and this succession to the chattel cannot be altered or controuled by any limitation of the party: but yet in such case it seems, that the executors or administrators of the lessee shall hold it in the right of, and as trustees for the successors; for the book says, they shall have it in *auter droit*. Co. Lit. 9. a. 46. b. 90. a.— But this rule, as to the succession of chattels, hath two exceptions: 1. In case of the king, who by his prerogative may take any chattels in succession, and, consequently, a lease made to him and his successors for years is good, and shall go accordingly, and not to his executors or administrators. Co. Lit. 50. a. 11 Co. 92. a.— The second exception is in case of the chamberlain of London, who, by custom of the city, confirmed by divers acts of parliament, may take chattels in succession for the benefit of orphans; but *quære*, if this custom extends to leases for years, for the books only mention recognizances, obligations, &c. which are given or entered into to the chamberlain and his successors; by way of security for orphans portions; *quære*, therefore, if a lease may be made to the chamberlain and his successors for years. Cro. Eliz. 464. 4 Inst. 249. 4 Co. 65. Fulwood's case.

Co. Lit.
45. b.
Mirror, 164.
293.
Vent. 53.

Another reason was, because at first these leases were made but for a small number of years, (for my Lord Coke tells us, that by the ancient law of *England*, no man could have made a lease for above forty years at the most,) and the reason thereof seems to be, because they were only made to serve the occasions and exigencies of the lord in cultivating and improving his demesnes, not to borrow money on or raise portions for daughters, or such other uses as are now made thereof; therefore there was no need to extend them to any great length of time, since they might be renewed as often as occasion required; besides, the lessees, if they were evicted, being only to recover damages, it would have been fruitless to prolong leases for the term of 1000 years, when the persons who are to possess under such leases had no remedy for their damages but by recourse to the representatives of the original lessor.

Vide title
Fines and
Recoveries.

Also, another reason might be, because these leases for years were under the power of the freeholder to destroy by a recovery; for the person coming in by the recovery, was supposed to come in by title paramount, and so was not bound or obliged by them, and, by consequence, few could be willing to take leases for any longer term, which they might so easily be defeated of.

Bro. tit.
Leases, 26.
F. N. B.
198. 220.
Vaugh. 127.
4 Co. 80.
Lev. 46.
2 Mod. 18.

But though in the reign of *H. 7.* it was resolved, that the lessees should not only recover damages as a recompence for the possession lost, but should also recover the possession itself; and the statute 21 *H. 8. cap. 15.* gives the termor power to falsify all manner of recoveries had against the tenant of the freehold, upon feigned and untrue titles; from whence men began to limit long leases, because by such purchases they escaped the wardship, relief, and other burdens that were annexed to the ancient tenures; yet no alteration was made in the succession to them, the law having been formerly settled as to that point; and if they had not carried the succession in the manner they formerly did, they had lost the end of such limitation.

And

And though at this day terms for years are multiplied to a much longer duration than they were formerly, and there is now ample remedy to recover the term itself, yet the succession continues the same; for besides the reasons already given, it would be inconvenient to have had one rule of property for short terms, and another for those that were longer, being all of the same nature, and still no more than leases for years; besides the difficulty of fixing the just bounds to any precise determinate number of years, since one or two years, more or less, would have made very little difference in reason, and long or short are only terms of comparison; as a lease for forty years is long with respect to one of eight or ten years, and yet short with respect to another of a hundred years; therefore, that there might be an uniformity in the law, all leases for years are holden to be of less value than estates for life, as being originally of much shorter duration, and also because they were under the power of the tenant of the freehold to destroy, and therefore are considered only as chattels, and cast upon the executors.

[Long terms, as for 2000 years, are considered (at least after part of the time has elapsed) not as leases, but as terms to attend the inheritance. Cowp. 597.]

We shall consider this head under the following divisions:

(A) Of what Things Leases may be made for Years.

(B) Of the Persons by whom Leases may be made:

And herein, first, of Leases by Infants.

(C) Of Leases made by Husband and Wife: And herein,

1. Of Leases made by Husband and Wife by the Common Law.
2. Of Leases made by them pursuant to the Statute of 32 H. 8. cap. 28.

(D) Of Leases by Tenant in Tail: And herein,

1. What Leases Tenant in Tail might have made by the Common Law.
2. What Leases Tenant in Tail may now make to bind his Issue, since the 32 H. 8. cap. 28.
3. When and in what Cases the Issue in Tail, or Strangers, shall be bound by voidable Leases made by Tenant in Tail.

(E) Of Leases for Lives or Years by Ecclesiastical Persons: And herein,

1. What Leases they might have made by the Common Law, and of the several enabling and disabling Statutes, with some general Observations on them.
2. Of the Rules to be observed, and Qualifications requisite to the Perfection of such Leases: And herein,

Leases and Terms for Years.

Rule 1. Where an Indenture or Deed is necessary.

Rule 2. When such Leases are to begin : And herein,

1. When such Leases as have no Date at all, or a void or impossible Date, are to begin.
2. Such Leases as have a good Date, and are delivered on the same Day ; in what Cases the Day of the Date or Delivery is to be taken inclusive, and in what Cases exclusive.
3. Such Leases as have a good Date, but are not delivered till a Week or Month, &c. after, when they are to begin, and how the Declaration on such Leases is to be framed.

Rule 3. Within what Time the old Lease is to be surrendered ; and herein of concurrent Leases.

Rule 4. That such Leases are not to exceed three Lives, or twenty-one Years.

Rule 5. Of what Things Leases may be made to bind the Successor.

Rule 6. What shall be said a usual Letting to Farm upon the several Statutes, and by what Persons.

Rule 7. What Rent is to be reserved ; And herein,

1. That there must be a Rent reserved.
2. That this Rent must continue due, and be payable to the Lessors and their Successors.
3. That such Rent must be the same, or more in Quantity than hath been reserved within twenty Years next before such Lease made : And herein,
 1. What shall be said to be the ancient Rent, where Variety of Rents have been reserved, or something formerly reserved now omitted or varied.
 2. In what Manner such Reservation is to be made.
 3. Where the Addition of more Land, with or without the Addition of more Rent, shall avoid such Leases.
 4. Where a Reservation of the whole Rent, or only *pro Rata* on a Lease of Part, shall be good.

Rule 8. That such Leases must not be made without impeachment of Waste.

(F) Of Leases by Parsons, Vicars, and others, with respect to other Qualifications.

(G) Of the Consent or Confirmation of others to Leases made by Ecclesiastical Persons: And herein,

1. Where

1. Where Confirmation is necessary either in respect of the Leases or Estates made, or of the Persons making the same.
2. What Persons are to confirm such Leases or Estates, and in what Manner.
3. What Estates they who make such Confirmation are to have.
4. At what Time such Confirmation is to be made.
5. How far a Regard is to be had to the true naming of the Corporation or Persons who do confirm.

(H) Of void or voidable Leases by Ecclesiastical Persons: And herein,

1. Against whom Leases not pursuant to the Statutes, or otherwise defective, are void or only voidable.
2. By what Means and in what Cases such voidable Leases may be made good.
3. The Manner of avoiding such Leases as are only voidable.

(I) Of Leases made by those who have but a particular Estate or Interest in the Lands leased: And herein,

1. Of Leases made by Tenant in Dower or Curtesy.
2. Of Leases made by Tenant for Life.
3. Of derivative Leases, or by one who is but a Lessee for Years himself.
4. Of Leases made by a Disfeisor or Disseisee.
5. Of Leases made by Joint-tenants or Tenants in Common.
6. Of Leases made by Copyholders.
7. Of Leases made by Executors or Administrators.
8. Of Leases made by a Bailiff of a Manor.
9. Of Leases made by a Guardian.
10. Of Leases made pursuant to Authority.
11. Of Leases made pursuant to Powers in private Conveyances and Settlements.

(K) By what Form of Words Leases may be made.

(L) What Certainty is requisite to Leases for Years as to their Beginning, Continuance, and Ending: And herein,

1. With regard to the Date of the Lease.

2. With regard to other Circumstances taken notice of in the Deed of Lease, whereby to ascertain the Commencement thereof.
3. The Certainty of Leases for Years as to their Continuance.
4. The Certainty of Leases for Years as to their Duration and Ending.

(M) In what Cases, and to what Respects an Entry by the Lessee is requisite to the Perfection of his Lease.

(N) Leases for Years, when to take Effect as a Reversion, when as a future Interest, and when neither the one nor the other.

(O) Leases for Years by Estoppel, how far and against whom such Leases are good.

(P) Leases for Years and future Interests, how far they may be barred or destroyed, and how far not, and where an Entry before the Term begun is a Disseisin.

(Q) How far, and by what Means, Leases for Years in Trust to attend an Inheritance may be barred or destroyed.

(R) Leases for Years, when merged by Union with the Freehold or Fee.

(S) Of Surrenders of Leases for Years : And herein,

1. Of Surrenders in Fact or Express: And here again,
 1. *By what Words such Surrender may be made.*
 2. *Upon what Estate such Surrender may operate.*
2. Of Surrenders in Law, or implied Surrenders: And herein,
 1. *With regard to Leases in Possession.*
 2. *With regard to Leases in Futuro.*
 3. *With regard to the Thing itself so surrendered.*

(T) Leases when determined by cancelling the Deed.

(T. 2) When forfeited.

(U) Of the Renewal of Leases.

(A) Of what Things Leases may be made for Years.

AFTER such time as leases for years began to be looked upon as fixed and permanent interests, and that the lessees were sufficiently provided to defend themselves, and their possessions, against the acts and incroachments as well of the lessor as of strangers, men found it their interest to improve and encourage this sort of property, and therefore extended it to all sorts of interests and possessions whatsoever, being led thereto by that known rule, that whatsoever may be granted or parted with for ever, may be granted or parted with for a time; and therefore not only lands and houses have been let for years, but also goods and chattels, though the interest of the lessee therein differs from the interest he hath in lands or houses so let for years: for if one lease for years a stock of live cattle, such lease is good, and the lessee hath only the use and profits of them during the term; but yet the lessor hath not any reversion in them to grant over to another, either during the term or after, till the lessee hath re-delivered them to him, as he would have of lands in case of such lease for years, for the lessor hath only a possibility of property in case they all outlive the term; for if any of them die during the term, the lessor cannot have them again after the term; and during the term he hath nothing to do with them, and, consequently, of such as die, the property rests absolutely in the lessee: so, whether they live or die, yet all the young ones coming of them, as lambs, calves, &c. belong absolutely to the lessee as profits arising and severed from the principal, since otherwise the lessee would pay his rent for nothing; and therefore this differs from a lease of other dead goods and chattels; for there, if any thing be added for the repairing, mending, or improving thereof, the lessor shall have the improvements and additions, together with the principal, after the lease ended, because they cannot be severed without destroying or spoiling the principal; neither is the succession of young ones, in case any of the old ones die, to be resembled to a corporation aggregate, whereof when any die, those that succeed shall be said part of the same corporation, for the corporation, in its publick capacity, never dies; but this being a lease of such and such individual cattle, when any of them die, the possibility of reverting property, which was left in the lessor, is determined and at an end. But the lessee in such case cannot kill, destroy, sell, or give them away, during the term, without being subject to an action of trespass, as it should seem; but in case of a lease of a house, together with goods, it is usual to make a schedule thereof, and affix it to the lease, and to have a covenant from the lessee to re-deliver them at the end of the term, and without such covenant the lessor could have no other remedy, but trover or detinue for them after the lease ended.

Godb. 112.
Leon. 42.
Owen, 139.
5 Co. 16, 17.
Dyer, 56. a.
110. a.
212. b.
Bro. tit.
Leases, 23.
2 Bull. 7.

Lit. § 71.
Co. Lit.
57. a.

Bro. tit.
Leases, 40.

If one hath a corody for life, he may let it to another, or to the grantor himself; so may the grantee of house-bote, or hay-bote; but in case such lease be to the lessor himself, rendering rent, he can only have them by way of retainer, being to arise out of his own provision, or his own land.

Hard. 357.

But as to lands or other things of inheritance, as they may be granted or departed with for ever, so they may for a time, and, consequently, may be leased for years in all cases where no inconvenience or injury to the publick is like to ensue; for then mens private interests must give way to the publick, and what might otherwise in its own nature be good and allowable, must upon that account be disallowed and stand condemned; wherefore it having been settled, that all leases for years were but chattels, and as such should go to executors or administrators, the first case wherein we find any objection to a lease for years is, that of the office of Marshal of the King's Bench Prison, for that being an office of great trust, concerning the administration of justice in the keeping of prisoners, if it should be granted for years, it might be injurious to the publick, by being in suspense till probate of the will or administration taken out; and if the officer should die indebted, so that none would prove his will, or take out administration, then there would be no officer at all; and executors or administrators would be in by act of law, without allowance of the court: also, it might be a question, if such office should not be forfeited by outlawry, or be assets in the executor's hands; and many other inconveniencies would follow, if such grant for years were allowed: for the same reason it was holden likewise, that the offices of *custos brevium*, chirographer, clerk of the pipe, of the king's silver or of the crown, remembrancer or chamberlain of the Exchequer, prothonotaries, and other offices in the several courts of justice, cannot be granted for years; and though the offices of sheriff and coroner were granted for years, till restrained by 14 E. 3. cap. 7. yet it was never debated what inconveniencies might ensue by allowing thereof. And these reasons held equally good against granting the office of warden of the Fleet, or any other (a) gaolership.

(a) In 2 Cha. Ca. 70. it is said by my Lord Chancellor, that he thought the case of a gaolership not grantable for years too easily slipped over.

6 Mod. 57. Sutton's case. [But see ft. 8 & 9 W. 3. c. 27. and 27 G. 2. c. 17. with respect to this office.]

Raym. 216. 2 Lev. 71. 3 Keb. 32. The King v. Lady Broughton.

(b) Note:

There seems a difference between Sir George Reynolds's case and this, because in Sir George Reynolds's case the grant for years was from the crown, in whom all offices, in relation to the administration of justice, are originally and inherently lodged; and therefore, for the crown to grant out such office for years,

And although it hath been resolved, that the office of Marshal of the King's Bench Prison cannot be granted for years, yet it hath been holden, that a lease thereof for years during the life of the grantee is good; for hereby the danger of the office going to executors is avoided, which the book says is the sole reason why the office is not absolutely grantable for years.

Also it appears, that the dean and chapter of *Westminster* made a lease for years of the Gatehouse-prison, and the lessee had committed several offences which amounted to a forfeiture, for which the office was seized, but no (b) objection made to its being let for years.

years, may be liable to the objections before mentioned; but in this case the dean and chapter are the immediate grantees of the crown, and they have the office to them and their successors for ever in fee, and are perpetual gaolers themselves, and answerable to the crown, notwithstanding any superior lease to another; and therefore they always take security of such under-lessee for their own indemnity.

But such offices as do not concern the administration of justice, but only require skill and diligence, may be granted for years, because they may be executed by deputy, without any inconvenience to the publick: Therefore, where a grant for years was made of the office of garbler of spices in *London*, it was adjudged to be a good grant, or at least a good appointment for years, within the intent of the statute 1 *Jac. 1. cap. 19.*

The office of printer was granted for years, 6 *Car. 1.* and held a good grant, being but an employment: So, the office of postmaster was granted to the Lord *Stanhope* for years, and held good. Hard. 46.
Jones and
Clerk.

The office of registrar of policies of assurance in *London* concerning merchants was granted by the king for years, and adjudged to be a good grant, because it did not concern the administration of justice in any court, but required only the skill of writing after a copy: So, the office of making and sealing *sub-pœnas* was granted for years, and allowed to be good; and there

several precedents are cited of offices granted for years; as, first, offices in which the safety of the realm was concerned, as the office of the warden of a haven or port by *H. 6.* of gunpowder by 1 *Car. 1.* of making gunpowder by *Car. 2.* Also, offices concerning the trade of the realm have been granted for years; as 1 *H. 7.* of the exchange of money; 18 *H. 8.* of gager; 17 *Rich. 2.* of aulnager, though a seal belongs to it, with which the officer is intrusted; of the letter-office, 3 *Car. 1.* Also, offices in courts of justice have been granted for years; as the office of surveyor of the green wax, of the sixpenny writs in Chancery and *sub-pœnas*, of comptroller and customer, and of making out process in *C. B.* All these, and several others, have been granted for years; but no dispute having been made of the validity of them, how far some of them would hold at this day, may be a question. Hard. 352.
Hard. 351.
354-357-

But where one made a grant for years of the stewardship of a court-leet and court-baron, this was holden void as to the court-leet, being a judicial office, but good as to the court-baron, being only ministerial, and the suitors judges thereof; but the grant appearing afterwards to be for years determinable upon the death of the lessee, it was holden good for both, because there was no danger of its coming to executors or administrators. Dyer, 303.
Hob. 146.
3 Keb. 80.

One Mrs. *Dennis* was found by office to be an idiot *a nativitate*; the king grants the custody of body and estate to Sir *Alexander Frazier*, his executors and administrators, during the idiocy; Sir *Alexander* dies, and then the king grants the custody to Mr. *Prodgers*; and whether he or the executrix of Sir *Alexander* had the better title, was the question. It was said to be a trust in the king, and therefore not grantable to executors or administrators, and that if the grantee die intestate, there would be none to take care of the idiot. On the other side it was said, that the king had not only a trust, but an interest, and might have disposed of the 2 Lev. 245.
2 Jon. 126.
Howard and
Wood.
2 Chan. Ca.
Prodgers v.
Lady Fra-
zier, Vern.
9. 137.
S. C.

the profits to his own use, or have granted them over as he thought fit, in case of an idiot, though it was otherwise in case of a lunatick; and that being a chattel, it should naturally go to executors; and to this opinion my Lord Chancellor inclined, but directed the validity of the patent to be tried at law: and (a) in *B. R.* the grant to Sir *Alexander* was holden good; for the king has the same interest in an idiot that he had in his ward, which always went to the executor of his grantee, though it was otherwise in the case of a lunatick.

(a) 3 Mod.
43. Vern.
192. S. C.

2 Roll. Rep.
274.
Godb. 413.

Co. Lit.
16. b.
9 Co. 97. b.

The office of park-keeper was granted for years, and no objection made to it; for this does not concern the administration of justice, but only requires diligence and care.

Dignities or honours cannot be granted for years; as to be earl, duke, baron, &c. because then they must go to the executors or administrators, whilst the estate that should support them would go to the heir, and so introduce confusion and absurdity.

By the 23 *H. 6. cap. 10.* it is provided, "That no sheriff shall let to farm in any manner his county, nor any of his bailiwicks, "hundreds, or wapentakes;" which proves that before this statute it was not unusual to let them to farm.

By the 12 *Car. 2. cap. 23. § 27.* the lord treasurer, or commissioners of the treasury for the time being have power to let to farm all or any the rates or duties of excise upon beer, ale, cyder, and other liquors therein mentioned, so as the same exceed not the term of three years; without which clause the treasurer or commissioners of the treasury could not have made such lease, though perhaps the king himself might, having the absolute interest and ownership therein.

By the 12 *Car. 2. cap. 25. § 3.* power is given to the king's agents for the granting of wine licences to any person or persons for any time or term not exceeding twenty-one years, if such person or persons shall so long live, upon such rent as shall be agreed on, to be paid half-yearly; such licences are not to be granted to any but those who personally use the trade of selling by retail, or to the landlord of such house, nor shall the same be assignable, or of any benefit but only to the first taker.

By the 22 & 23 *Car. 2. cap. 14. § 6.* power was given to the master and chaplains of the *Savoy*, to encourage the rebuilding thereof, to demise any of the lodgings for any term not exceeding forty years, under such rents as they could procure, without renewing.

[By the 27 *G. 3. c. 26.* the lord treasurer, or commissioners of the treasury for the time being are empowered to let to farm for any term, not exceeding three years, the duties upon post-horses.]

(B) Of the Persons who may make Leases: And herein, first, of Leases made by Infants.

AS to leases made by infants, or such as are under the age of twenty-one years, what seems most considerable is, whether any, and what leases for years made by such are absolutely and *ipso facto* void, or only voidable by them; about which the opinions of the books seem a little unfettled.

Some opinions are, that all leases for years made by infants (a) without reservation of rent, are absolutely void, and not merely voidable.

441. (a) So, if a tittle only had been reserved, as a pepper corn. Mod. 263.—But that a lease made by an infant to try his title is good, though no rent be reserved. Moor, 105. 2 Leon. 216. Noy, 130.

Other opinions there are, that leases for years in general by infants are only voidable, and not void, without taking notice whether any rent were reserved on such leases or not; and some even seem to hold, that though no rent at all be reserved, yet the leases are not thereby absolutely void, but only voidable by the infants when they come of age, and that they may confirm the same at their full age by accepting fealty, which is at least incident to every lease.

from the court in the case of Zouch v. Parsons, 3 Burr. 1806.]

Also, most of the books agree, that if a rent were reserved on such lease for years, then it would be only voidable by the infant at full age, without saying how it would be if no rent at all were reserved, unless by implication that it would be void in such case.

But all the books agree, that if an infant make a lease for years, he cannot plead *non est factum*, but must avoid it by pleading the special matter of his infancy; which seems to favour the opinion of those who hold, that the lease is not absolutely void; for if the lease were absolutely void, there does not seem to be any good reason why he might not plead *non est factum*, as a feme covert certainly may do in such case, whose lease is absolutely void, so that no acceptance of rent after her husband's death can make it good.

An infant copyholder without licence of the lord made a lease for years by parol, rendering rent, and at full age was admitted, and accepted the rent, and then ousted the lessee: and in this case, though it was agreed, that a lease for years, rendering rent, by an infant, of freehold lands was only voidable, yet it was urged that in case of a copyhold it would be otherwise, because the lease not being warranted by the custom would be a disseisin to the lord, and, consequently, a forfeiture of his copyhold, which being a great mischief to the infant, the court ought rather to help him, by adjudging such lease to be absolutely void: but, notwithstanding this, it was adjudged that the lease was a good lease till avoided, and that a lease for years by a copyholder without licence

Moor, 105.

2 Leon. 218.

Hutton 102.

Roll. Rep.

Mod. 263.

2 Leon. 216.

Noy, 130.

Lit. § 547.

Co. Lit. 45.

b. 308. a.

Lev. 6.

Moor, 78.

[This opi-

nion hath

been con-

firmed by

what fell

from the court in the case of Zouch v. Parsons, 3 Burr. 1806.]

Bro. tit.

Leases, 50.

Moor, 663.

Roll. Abr.

729, 730.

3 Mod. 307.

3 P. Wms. 210.

5 Co. 119.

2 Inst. 483.

Moor, pl.

132.

Cro. Eliz.

127. 857.

Poph. 178.

10 Co. 43.

Vide head

of Infancy

and Age,

vol. 3. 610.

Latch. 199.

Godb. 364.

Ashfield and

Ashfield.

Noy, 92.

and Jon.

157. S. C.

which last

book says,

that it was

held to be no

forfeiture as

to the lord,

but that ad-

mitting it

were, yet it

was a good lease as to all strangers, and that for this reason principally it was adjudged, such acceptance made it good.

licence is not a disseisin; and admitting it should be a forfeiture in this case, yet if the lord enters for it, the infant may re-enter upon him, and so is at no mischief; and that the infant having accepted the rent at full age, he had made it good and unavoidable.

Cro. Jac.
320. Kett-
ley and
Elliot,
Brownl.
120.
2 Bulf. 69.
Roll. Abr.
731. S. C.
adjudged.

If an infant takes a lease for years of lands, rendering rent, which is in arrear for several years, then the infant comes of age, and still continues the occupation of the land, this makes the lease good and unavoidable, and, by consequence, makes him chargeable with all the arrears incurred during his minority; for though at full age he might have departed from his bargain, and thereby have avoided payment of the arrears which the lessor suffered to incur during his minority, yet his continuance of possession after his full age ratifies and affirms the contract *ab initio*, and so gives remedy for the arrears of rent incurred from the time of the contract made.

Dalf. 64.
Curiam.

But if an infant possessed of a term for years sells it for money, and after he comes of full age receives part of the money for it, he shall avoid the grant notwithstanding; for the contract, as said, being void in the commencement, it cannot be made good by any subsequent act.

Co. Lit.
45. b.

By custom in some places an infant seised of lands in socage may at the age of fifteen years make a lease for years, which shall bind him after he comes of age; for the custom makes fifteen his full age for that purpose.

4 Leon. 4.

An infant made a lease for years, and at full age said to the lessee, *God give you joy of it*; this was holden by *Mead* a good affirmation of the lease; for this is a usual compliment to express one's assent and approbation of what is done.

Anon.
2 Leon.
220. 1.

[The father of an infant leased his son's lands for 20 years, and at full age the son, upon the back of the indenture, released all his right to the defendant: it was holden by *Wray, J.* that this lease was made by the father, as guardian, and voidable by the son; and that the indorsement by the son was a good assignment.]

Plow. 212.
Dyer, 209.
Case of the
Duchy of
Lancaster.

If the king within age makes a lease for years, this is binding presently, and cannot be avoided by him, either during his minority or when he comes of age; for the politick rules of government have thought it necessary that he, who is to govern and manage the whole kingdom, should never be considered as a minor, incapable of governing himself and his own affairs.

(C) Of Leases made by Husband and Wife : And herein,

1. Of Leases made by Husband and Wife by the Common Law.

IT is clearly agreed, that if a husband, seised of lands in right of his wife, make a lease thereof by indenture or deed poll, reserving rent, that this is a good lease for the whole term, unless the wife, by some act after the husband's death, shews her dissent thereto ; for if she accepts rent, which becomes due after his death, the lease is thereby become absolute and unavoidable ; the reason whereof is, that the wife, after her intermarriage, being by law disabled to contract for or make any disposition of her own possessions, as having subjected herself and her whole will to the will and power of her husband, the law thereupon transfers the power of dealing and contracting for her possessions to the husband, because no other can intermeddle therewith, and without such power in the husband they would be obliged to keep them in their own manurance or occupation, which might be greatly to the prejudice of both ; but to prevent the husband from abusing such power, and lest he should make leases to the prejudice of his wife's inheritance, the law has left her at liberty after his death either to affirm and make good such lease, or to defeat and avoid it, as she finds most subservient to her own interest.

So, if the wife join in such lease for years by indenture, if not made pursuant to the 32 H. 8. cap. 28. she is after her husband's death at liberty either to affirm it by acceptance of rent, or to dissent to and avoid it by bringing trespass, &c. in the same manner as if she had been no party thereto ; for her joining during the coverture, when she was not *sui juris*, but under the power of the husband, will not bind her after his death ; and if she chooses to avoid such lease, notwithstanding her joining therein, then it is so absolutely defeated *ab initio* as to her, that she may plead *non demisit*, because as to any interest that passed from her she did not demise, nor in truth had any power to contract, but the whole interest passed from the husband, and the lessee is in merely by virtue of the husband's contract ; and yet, because the lessee by his acceptance of such lease admitted them both to have power to join therein, he must accordingly, during the coverture, declare of the lease by them both, as an essential part of the description of the lease whereby he makes title.

But the indenture or deed poll, whereby such lease was made, being no essential part either of the description or lease itself, because the husband during the coverture might have made it by parol only ; therefore, it is neither necessary nor usual for the lessee in his declaration to make any mention thereof.

So also, if the wife's part in such lease were merely void, and her joining therein would have no effect to help the description of

Bro. tit.
Acceptance,
10. tit.
Leases, 24.
Cro. Jac.
332. Jordan
and Wilkes.
2 And. 42.
Plow. 137.

Cro. Jac.
563. Cro.
Car. 165.
426. Cro.
Jac. 617.
Yelv. 1.
Cro. Eliz.
769. Roll.
Abr. 350.

2 Co. 61.
3 Co. 21.
Plow. 431. a.
Leon. 192.
Cro. Eliz.
438. 482.
Sav. 109,

110. 112. Cro. Car. 527.

Yelv. 1.
Wilson and
Rich. Cro.

Car. 155.
Hopkins's
case; and
the S. C.
2 Bulf. 13.
obscurely
put, seem
cont.

of the lease, then the lessee ought in his declaration upon such lease to leave out the wife, otherwise his inserting of her as one of the lessors will vitiate his declaration: therefore, where the husband and wife sealed a lease for years of the wife's lands, and at the same time executed a letter of attorney to a third person to deliver such lease as their deed to the lessee, which he did accordingly, and then the lessee brought an ejectment, and declared of this by baron and feme; to which not guilty being pleaded, this special matter was found; the court, after argument, gave judgment that the plaintiff had failed in his declaration, because, as this case was, it was only the lease of the husband; for the delivery of the deed being essential to make it a complete deed, this ought to have been done by the wife herself in person; for she not being *sui juris* could not by such letter of attorney delegate any power or authority whatsoever to another, but such delegation was merely null and void; and, by consequence, the attorney's delivering it in her name was to no purpose, but it was only the lease of the husband, as being only effectually delivered by him; and, therefore, the plaintiff ought to have declared accordingly; for upon the matter it was no lease by the husband and wife, and then the plaintiff declaring upon it as such, hath failed in his description of the lease whereon he was to recover.

Cro. Jac.
617. Gar-
diner and
Norman.

Accordingly in another case, where in ejectment the plaintiff declared on a lease by the husband only, and not guilty pleaded, the like special matter was found as in the former case, and exception taken to the declaration, because the wife was omitted; yet the court held the declaration good, and disallowed the exception, because her manner of joining in the lease was merely void, as if she had not been named therein, and then the plaintiff in his description of such lease did well to omit her.

Cro. Eliz.
656. Wal-
fall and
Heath, Cro.
Jac. 563.
Dyer, 91.
146. Leon.
192. 204.

But now if the husband and wife join in a lease for years by parol of the wife's lands, rendering rent, or if the husband solely make such parol lease, rendering rent, this determines absolutely by his death, so that no acceptance of rent, or other act done by the wife, will prevent its avoidance; the reason whereof given in the books is, that her assent ought to appear to be given at the time when the lease was made, which without some deed or instrument in writing it cannot do; but this seems a very indifferent reason, when in the case of a lease for years by the husband, solely by deed, her assent appears not at all, but rather the contrary; and yet she may affirm such lease, if she thinks fit, after his death, as well as if she had joined therein; therefore a better reason for this distinction seems to be, that the inheritance and right of the estate continuing still in the wife, notwithstanding the intermarriage, if the husband does nothing to discontinue or divest that estate, all charges of his thereout fall off with his death, which determines his power and interest over the estate; but a lease for years being an immediate contract for or disposition of the land itself, if the same appears in writing duly executed, so that there can be no variation or deviation therefrom attempted by the lessee after the husband's death; the law so far gives countenance to
such

such lease, for the encouragement of farmers and husbandmen, that the same shall continue in force till the wife's actual dissent or disagreement thereto; but because there can be no such certainty of the terms of a parol lease, when nothing appears in writing to manifest them; therefore they, like other charges of the husband, fall off and drop with his estate or interest therein.

If the husband and wife make a lease for years of the wife's land, without reservation of any rent, yet it hath been adjudged that this is a good lease by them both during the coverture, and that the wife, after the husband's death, may affirm the same by acceptance of fealty, or bringing an action of waste; so that the reservation of rent is not essential to the existence or continuance of such lease after the husband's death, but only a writing attesting the same, and the wife's allowance and approbation thereof; for as the husband made such lease at first, without any reservation of rent; so the wife, if she thinks fit, may continue the lessee in possession, after his death, upon the same terms.

The husband being seised of copyhold lands in right of his wife in fee, makes thereof a lease for years, not warranted by the custom, which is a forfeiture of her estate; yet this shall not bind the wife, or her heirs, after the husband's death, but that they may enter and avoid the lease, and thereby purge the forfeiture; and the diversity seems between this act, which is at an end when the lease is expired or defeated by the entry of the lord, or the wife, after her husband's death, and such as are a continuing detriment to the inheritance; as wilful waste by the husband, or such acts as tend to the destruction of the manor, as non-payment of rent, denial of suit or service; such forfeitures as these bind the inheritance of the wife after her husband's death; but in the other cases the husband cannot forfeit by his lease more than he can grant, which is but for his own life.

If the husband, seised of a copyhold manor in right of his wife, lets copyhold land, parcel thereof for years, by indenture, and dies, this shall not destroy the custom of demising by copy, because the wife may enter and avoid that lease, the husband having no power by his own act or disposition to bind the inheritance of the wife.

A man seised of lands, in right of his wife, makes a lease for years thereof by parol, and then he and his wife levy a fine to a stranger, and die: it was adjudged, that the conuzee of the fine should avoid this lease; for being made by parol only, it was absolutely void as to the wife, so that no acceptance, or act of hers, after his death, could make it good; and then the conuzee, who came in wholly by the wife, shall take advantage thereof as the wife herself should have done, for the husband's joining in the fine was only for conformity; for the whole estate and inheritance passed from the wife, and nothing from the husband; and of void acts, or when they begin to be so, strangers may have the benefit.

But where the husband and wife by indenture made a lease for ninety-nine years of the wife's lands, though without reversion of

Hut. 102.
Cro. Eliz.
112. Jack-
son and
Mordant.

2 Roll. Rep.
344. 361.
Cro. Car. 7.
Savern and
Smith. Cro.
Eliz. 149.
Head and
Chaloner,
4 Co. 27.

Cro. Eliz.
459.
Coningsby
v. Ruskey.

Cro. Eliz.
216.
Leon. 247.
2 Co. 77.
Harvey and
Thomas.

3 Leon. 153.
Cro. Eliz.
152. Cadet

and Oliver.
Adjourn.
according
to both re-
porters.

rent, and after joined in levying a fine of the reversion to a stranger; the better opinion was, that the conuzee should hold subject to this lease, for being by indenture, it was not absolutely void, but only voidable by the wife after her husband's death; and then when she joins in a fine of the reversion, before her time of election for avoidance thereof comes, this destroys her own power of election, because now she has nothing more to do with the estate; and it cannot transfer a like power of election to the conuzee, because that was a thing merely in action, and peculiar to the wife, in regard of her coverture, and, consequently, the lease is become absolute, and the conuzee shall hold subject thereto.

Cro. Jac.
417. Roll.
Rep. 401.
441.
3 Bult. 272.
Roll. Abr.
592.
3 Mod. 300.
Quere, if
the husband
in this case
has any, and
what reme-
dy for the
rent incur-
red after the

A. and *B.* joint-tenants for their lives; *A.* takes *C.* to husband; and they, by indenture, let their moiety for twenty-one years, reserving rent; then the wife dies, and *B.* the surviving joint-tenant, would have avoided this lease, as the wife might have done if she had survived her husband: but it was adjudged, that the lease being only voidable, and not void, *quoad* the wife, by her death this power of avoiding it is gone, and cannot be transferred to the surviving joint-tenant, who claims not under, but paramount her; and then the lease is become unavoidable during the life of the other joint-tenant, for the lease being good at first, the wife's disagreement to make it void, was more necessary than her agreement was to make it good.

wife's death, for the reversion to which it was incident goes to the surviving joint-tenant, but he being in of that by title paramount, the lease has nothing to do with the rent, and the husband, for want of a reversion, can neither distrain nor avow for the same. But *quere*, if he may not maintain an action of debt or covenant in law, or express covenant for payment of the rent, if there were any; & vide Bro. tit. *Leases*, 4. Det. 7. Dyer, 23. b. 29. a. Roll. Rep. 442.

Cro. Eliz.
237. Moor,
pl. 514.
Grule and
Locroft.
Co. 155.
S. C.

Husband and wife, joint-tenants for sixty years, if they or either of them so long live, the husband by indenture lets the land for fifty years, to commence immediately after his decease, and dies, the wife survives; and if this was a good lease to bind the wife, was the question. It was objected, that it could not bind the wife, because it was not to commence till after the husband's death; that he might have outlived the whole term; and therefore it was as if he had granted the term to commence after his death; which being but a grant of bare possibility, had been clearly void. 2. It was objected, that the husband dying before the lease took effect, the interest in the whole term, vested in the wife by survivorship, and then the husband's disposition, which took not effect till his death, came too late to prevent it. But, notwithstanding, it was adjudged to be a good lease, and not like the case put of a grant of his term after his death, for there nothing passed till his death but a bare possibility only; but here a good term is created in interest presently, to take effect in possession after his death. As to the second point, the husband having an interest to dispose of, he might in his life-time, have disposed of the whole term, and it would have bound his wife; then here when he hath, by an act executed in his life-time, disposed of an interest in part of the term; this, by the same reason, must be good, and binding upon his wife.

Husband and wife made a lease for years, by indenture, of the wife's lands, reserving rent; the lessee enters; the husband, before any day of payment, dies; the wife takes a second husband, and he at the day accepts the rent, and dies: it was holden, that the wife could not now avoid the lease, for by her second marriage she transferred her power of avoiding it to her husband, and his acceptance of the rent binds her, as her own before such marriage would have done; for he by the marriage succeeded into the power and place of his wife, and what she might have done, either as to affirming or avoiding such lease, before marriage, the same may the husband do after the marriage.

Dyer, 159.
Roll. Abr.
475. 2 Roll.
Rep. 132.
S. C. cited.

A woman, guardian in socage, marries and joins with her husband, by indenture, in making a lease for years of the ward's lands, yet after her husband's death she may avoid the same; for though the husband has absolute power to dispose of all chattels, either real or personal, whereof he is possessed in right of his wife, and the wardship of the body and land, in this case, is but a chattel; yet the wife being possessed of it in right of the infant, and accountable to him for the profits when he comes of age, the husband's disposition shall not bind her after his death, but that she may avoid it in right of the infant, whose guardian she still continues to be; and her own joining in the lease was not material, because she was then under coverture, and had no disposing power at all.

Plow. 293;
Osborn and
Jay. Co.
Lit. 351. a.
Roll. Abr.
343.

As the wife's acceptance of rent or fealty, &c. will make good and unavoidable leases for years, made by her and her husband, or by her husband solely, if they be by indenture or deed poll; so if the wife die before her husband, the same election and power of affirming or avoiding such leases descends to her issue or heir; for such leases are good, till those who succeed to the estate defeat and avoid them by their disagreement thereto.

3 Bulf. 274.
Roll. Rep.
403.

Therefore, where a woman tenant in tail, having issued by a former husband, after his death married a second husband, and they, by indenture, joined in a lease for years of the wife's lands, rendering rent, and then the wife died without issue by the second husband, so that he was not entitled to be tenant by the curtesy, it was holden, that till the issue by the first husband entered, this lease remained good; and therefore, the husband there recovered in an action of covenant against the lessee, upon issue found for him, that there was no entry made by the wife's issue, because till then the lease was still subsisting, and consequently, the lessee bound by his covenants in such lease.

Yelv. 78.
Jeffery and
Guy.

So, where a man, seised of land in right of his wife, makes a lease for years, rendering rent, and then his wife dies without issue by him, whereby he is not tenant by the curtesy, but his estate determined; yet he may avow for the rent till the heir hath made his actual entry, because the lease was at first good, and drawn out of the seisin of the wife; and therefore, till the entry of the heir, remains good between the lessor and lessee, so that the lessee may maintain an action of covenant, and the lessor distrain and avow for the rent, till the heir hath entered.

9 H. 6. 43.
Pro. tit.
Avovery,
123.
Vaugh. 45.

Of Leases made by Husband and Wife pursuant to 32 H. 8. c. 28.

32 H. 8.
c. 28.

This statute hath made an alteration in the common law, and enabled all husbands, seised of lands in right of their wives, to make leases for twenty-one years, or three lives, observing the directions therein mentioned; which leases bind the wives and their heirs, so that they cannot now, after the husband's death, avoid such leases as they might have done at the common law; but if the directions in that statute are not observed, then the common law takes place, and the wives and their heirs are at liberty to avoid such leases in the same manner as they might have done before.

But as to the several qualifications requisite to make such leases good and binding, they being treated of at large under the head of Leases by Ecclesiastical Persons, letter (E), we shall here only insert one case for the better understanding of the statute.

Cro. Car.
22. Smith
v. Trinder.
[This case
was never
decided, for,
in conse-
quence of
Lord Ho-
bart's
doubts, a
special ver-
dict was
found, and
the matter
was after-
wards ended
by arbitra-
ment.]
(a) Note;
there was
no question
made upon
these words,
if, &c. as
to the con-
tinuance of
the lease,
which, as it

Husband and wife, the husband purchased land to him and his wife, and their heirs, and afterwards he, without his wife, lets this land for sixty years, (a) if they should so long live, rendering 280 l. per ann. rent at the two usual feasts, during the term; then the husband dies; and if this lease should bind the wife, by the 32 H. 8. c. 28. was the question? And it was holden by three justices that it should; for the words of the act are, *That all leases to be made by any person or persons having any estate of inheritance in fee-simple or fee-tail, in the right of their wives, or jointly with their wives, of an estate of inheritance, made before the coverture or after, shall be good, provided that the wife be made a party to every such lease to be made by her husband of any manors, &c. being the inheritance of the wife; and that every such lease be made by indenture in the name of the husband and wife, and she to seal the same, and that the rent be reserved to the husband and wife, and to the heirs of the wife, according to her estate of inheritance therein; so that the wife is appointed to join only when she hath the sole inheritance by the appointment of the rent, to be reserved to the heirs of the wife, and not when she hath a joint estate, as in this case; and then clearly, by the body of the act, the lease by the husband solely is good, and the proviso doth not extend to it.*

which, as it seems, determined by the death of either of them. Cro. Jac. 378. 5 Co. 9.

(D) Of Leases by Tenant in Tail: And herein,

1. What Leases Tenant in Tail might have made by the Common Law.

Co. Lit.
45. b.

IF tenant in tail after the statute *de donis* had made a lease for years, and died, this lease was not absolutely determined by his death, but the issue in tail was at liberty either to affirm or avoid it as he thought fit; and the reason why such leases for years were not holden to be absolutely determined by the death of the tenant in tail, who made them, was, either because they were drawn out of

of an estate of inheritance, which by possibility might continue for ever, and therefore was capable of enduring such a lease for years thereof; or because, being executed by the entry of the lessee, there ought to be an act of equal notoriety to defeat and undo it; which if the issue in tail thought fit to wave, the lessee then continued his possession in virtue of the first contract and entry. And this was but a reasonable liberty given to the issue in tail, because it might well be supposed that his ancestor was not qualified to keep all his possessions in his own manurance and occupation, but must necessarily let them out to farmers and husbandmen, who, by their skill and understanding in the arts of agriculture and husbandry, would be best able to preserve and improve the soil; and by their yielding an annual rent or income to the lessor or tenant in tail himself, would enable him equally to provide for the necessities and exigencies of himself and his family; and since the issue in tail, who was to succeed to the inheritance and possessions of his ancestor, might be supposed equally ignorant of the way and manner of improving and managing them to the best advantage, and would therefore be under the like necessity of letting them out to others, and yet, perhaps, not be able to get so good a rent or income for them; therefore, to prevent the charge and trouble of renewing such leases, or the difficulty of finding out new tenants upon every death, the law thought fit not to intermeddle one way or another therewith, but left it to the choice of the issue in tail, whether he would continue them or not. Another reason why the law would not condemn such leases as absolutely void by the death of the tenant in tail, might be, the discouragement that would thereby arise to farmers and husbandmen, who would not be easily induced to take leases, or bestow any great pains or labour upon possessions, which they were to hold by so precarious a title as the life of the tenant in tail only; and therefore, for these and other reasons, such leases for years were not looked upon to be absolutely void and determined by the death of the tenant in tail who made them; but the issue in tail successively, as each came into the estate, was at liberty either to continue or avoid them, as they found convenient; and by this liberty the issue in tail was sufficiently secured against any injury or inconvenience arising from the contracts or leases of his ancestor, and the statute *de donis* in no danger of being impeached, since it was in the issue's own choice to consider thereof, and to govern himself accordingly, either in the affirmance or avoidance of such leases, as he found most for his advantage; therefore, (a) acceptance of the rent, or fealty, or bringing an action for recovery thereof, or an action of waste, were such acts as amounted to a confirmation of the lease, because these plainly manifested his intent to continue the lessee in possession upon the terms of his lease; and by consequence, such issue could never afterwards avoid it during his own life.

(a) 7 Co. 8.
b. Count
of Bedford's
case. Bro.
tit. *Acceptance*, 10.
Dyer, 46. a.
51. b. 95.
pl. 40. Bro.
tit. *Acceptance*, 13.

If tenant in tail makes a lease to *A.* for twenty years, and the lessee makes a lease to *B.* for ten years, and then the tenant in tail dies, and the issue accepts the rent of *B.* this is no affirmation of

the lease, because *B.* was under no obligation of paying his rent to him, and is answerable for it over again to *A.* and therefore his payment to the issue in tail was voluntary, and in his own wrong, and the issue's acceptance thereof not conclusive more than if he had received it of a mere stranger; and, by consequence, the issue in tail, notwithstanding such acceptance, may enter and avoid the lease: but if the issue had accepted the rent from *A.* this had amounted to a confirmation of the lease made to *A.*, and, by consequence, he could not after avoid the lease to *B.*, which was derived thereout. But if *A.* had assigned five acres of the land in lease to *B.* for the residue of twenty years, and the issue in tail had accepted the rent from *B.*, this would amount to a confirmation of the entire lease to *A.*, because the rent issuing out of the whole, and out of every part of the land, *B.* as to these five acres, succeeded in the place of *A.* by having his whole interest therein; and then the issue in tail, by acceptance of the rent from one, whose part, as to him, was equally chargeable with the whole rent, hath given his consent, that the whole estate chargeable therewith shall continue, though he chose to take his rent out of part only; for otherwise he would do injustice to *A.*, who would be liable to make recompence to *B.* for the overplus of the rent, and yet have no recompence himself, if the issue might defeat the residue of the lease remaining in his hands.

Dyer, 51. b.
7 Co. 9. a.
1 Roll. .
Rep. 260.
3 Leon. 154.
2 Bulf. 44.
4 Mod. 5.

Tenant in tail, before 27 H. 8. c. 10. of uses, made a feoffment in fee to the use of himself and his heirs: and, after, he and his feoffees made a lease for years, rendering rent, and after the statute made, tenant in tail dies seised, and his issue aliens the land by fine before entry upon the lessee, or receipt of the rent: the great question was, if he might after avoid this lease; and by the better opinion of the justices of both benches, *prater Sanders*, the alienee could not avoid it, whether he received the rent or not, for the lease was not absolutely void by the death of the tenant in tail, but only voidable by the issue by his entry; then when the issue, before such entry, conveys over the land to a stranger, the lease, being not then avoided, continues still a charge upon the estate, and the stranger cannot enter to avoid it, because a right of entry can no more be transferred to a stranger than a right of action, and by consequence, the conusee must hold subject thereto, having no means to avoid it.

Co. Lit.
349. a.
Dyer, 315.
Dyer, 51. b.

If tenant in tail enfeoffs his eldest son within age, and he after full age makes a lease for years, and then the father dies, whereby he is remitted to the estate-tail, yet he shall not avoid the lease: so, if the son had disseised his father, and had made a lease for years, and then the father had died, by which the disseisin was purged, yet the lease would continue good and unavoidable; because in these cases the estate, out of which the lease was derived, is not defeated, but only the nature of it altered and changed; and the lease for years being an immediate disposition of the land itself, so long as that continues in the same person that made the lease, so long there is an estate capable of enduring the lease, and consequently, the lessor shall not avoid it; but if
the

the son after such feoffment or disseisin had at full age granted a rent-charge, common of pasture, &c. and then the father had died, this remitter and alteration of the nature of the estate would discharge the land of those charges; because being granted at first out of a defeasible estate, they were of course liable to be defeated with that estate, and when that estate is defeated and gone, such collateral charges drop and fall off with it; but the lease for years, in the other case, carries the very possession of the land itself, and then the alteration that is made by the remitter can only work upon the reversion which was left in the lessor, not upon the possession of the lessee, which was divided and taken out of the estate before that remitter took effect; and the lease being made when he was at full age, prevents the operation of the remitter as to that lease, which was his own act.

Tenant in tail made a feoffment in fee to the use of himself and his heirs, and after made a lease for years, rendering rent, and died; the issue accepted the rent: it was holden, that this did not affirm the lease, because the issue was remitted to the estate-tail by descent, and so the lease utterly void, being made by the father, then tenant in fee-simple; and the difference between this case and the case next but one above-mentioned, seems to be, that the lease there being before 27 H. 8. cap. 10. the possession passed from the feoffees, and not from the tenant in tail himself, and then when that statute came, it could not execute the possession to the use, as to the reversion which was left in the feoffees; and so the possession of the lessee continued untouched by that statute, and drawn out of the legal possession of the feoffees, and and then the bare remitter of the issue, as to the reversion, could not defeat the possession of the lessee, which was not drawn out of any estate his ancestor had then in possession; but he must avoid it by entry upon the aid and construction of the statute *de donis*: but in this, the lease for years is drawn out of the fee-simple and estate, which the tenant in tail had in possession himself; and then the remitter, which is wrought by the descent, defeating that estate, avoids the lease likewise.

If tenant in tail makes a lease for ten years to begin ten years hence, and dies, and the issue within the ten years enters and makes a feoffment in fee, the feoffee, at the end of the ten years, shall have election either to affirm and make good such lease, or to avoid it; for upon the death of tenant in tail the possession was become vacant, and none had a right to enter but the issue in tail, for the time of the lessee's entry was not yet come; then, when the issue enters generally, his primary right was, in respect of the inheritance, descended to him as issue in tail, and he had no occasion to direct his entry at that time to any other purpose; and therefore his entry shall be intended, in respect of the estate-tail descended to him; and when after such entry he makes a feoffment in fee to a stranger, this transfers the possession just in the same plight as the issue in tail himself had it, without any thing done to determine his election one way or another; and then the same power of election passes incorporated in the feoffment;

Moor, pl.
1143.

Dyer, 2-9.2.
Plow. 436.

ment; and the feoffee, when the time for making use thereof is come, may use it either to determine the lease by ousting the lessee, or to affirm or make it good by acceptance of rent from him.

Dyer, 279. a.
Plow. 436.

If tenant in tail makes a lease for years, to begin after his death, rendering rent, and dies, and the issue accepts the rent, yet *Manwood* was of opinion, that he might notwithstanding enter, and avoid the lease; and the reason he gave was, because the lease did not take effect in possession during his life; *sed* Catlyn

(a) But *qu;* for in Carth. 258. in the case of Symonds and Cudmore, it is said to be agreed, and resolved by the court, that if tenant in tail makes a lease of any of the lands entailed to commence after his death, this is void *ab initio*.

hoc negavit; and it seems with good reason; for since the estate-tail is an estate of inheritance, capable of enduring such a lease, where the difference is between letting it to begin presently, and letting it to begin after his death, or, as it is in the next preceding case, to begin ten years hence, when he himself dies in the mean time, does not at all appear; for the lease binds from the time of the making in one case, as well as in the other, though the time of their commencement in possession be different; and since the issue in tail is no more bound by the one than the other, it seems hard and inconsistent to take from him his power of election to continue the one lease, and yet allow it him in the other; therefore it should seem, the lease in either case is (a) absolutely void, but that the issue hath election to continue or avoid it, as he himself thinks fit, and, by consequence, his acceptance of the rent hath determined his election to continue the lease, and then he can never enter after to avoid it.

7 Co. 14. a.
Co. Lit.
349. a.
Co. 147.
Moor, 325.

If a tenant in tail makes a lease for life, by which he gains a new reversion in fee during the life of tenant for life, and after he grants a rent-charge, or makes a lease for years, and then the tenant for life dies, whereby he is become again tenant in tail, and the reversion in fee, out of which the rent-charge or lease for years were to take effect, defeated, yet shall the lease or rent continue good against himself, because though they were granted out of a defeasible possession, yet they were granted likewise by him who had the true and ancient right in him, and such grant or lease would have bound both, if the defeasible possession had been in one hand, and the ancient right in another, and both had joined therein: so, by the same reason, when such defeasible possession and ancient right are conjoined in one person, and he makes such lease or grant, though the one fails, yet the other will be called in to support them: so, if such tenant in tail had made a feoffment in fee upon condition to the use of himself and his heirs, and then had made such lease, or granted such rent-charge, and after the condition were broken, yet the lease or grant would still continue good against him during his own life, because made by one who had all the right, both ancient and new, in him at the time of making or granting thereof.

Vent. 357.
Anonymous.

A. tenant in tail, remainder to B. in tail, A. makes a lease for the life of the lessee not warranted by the statute of 32 H. 8. cap. 28. and dies, leaving B. in remainder his heir; B. by indenture makes a lease for 99 years, to commence after the death of the tenant for life, rendering rent; then the tenant for life sur-

renders

renders to *B.* upon condition and dies; *B.* suffers a common recovery with single voucher, and dies; the lessee for years enters, and the heir of *B.* distrains for the rent; and if this distress was lawful, was the question? For the lessee it was argued, that it was not; for either *B.* was remitted by the surrender, or he was not; if he was remitted, then the lease for 99 years, which was derived out of the new reversion in fee, and descended to him from *A.* was by such remitter determined; the reversion out of which it was derived being vanished and gone; and then he could not distrain for rent where no lease was in being: if he was not remitted, the acceptance of the surrender being his own act, and but upon condition, then he was still in of the defeasible estate descended to him from *A.*, and, by consequence, his recovery with single voucher could not bind his entail, nor the remainder over; and then when he died without issue, (as to make it a case it should seem he must,) both his defeasible estate by the death of the tenant for life, and his own estate-tail were determined and gone; and consequently, admitting the lease continued, (which it did not,) yet his heir was not entitled to the rent, but those in remainder. But it was adjudged in *C. B.* that the distress was lawful; for the lease for life made by *A.* could be a discontinuance no longer than during the life of the lessee; then when *B.* after the death of *A.* made a lease for 99 years by indenture, he having then the right of the entail in him, clothed with a defeasible fee-simple, this lease, when the discontinuance was at an end, (as it was by the surrender of the tenant for life, or at least by his death,) is good against himself by estoppel, if not in point of interest; and then, he being tenant in tail, the recovery with single voucher binds that estate-tail and remainder, and, by consequence, his heir has a good title to the rent, and his distress well taken for it. *Note*; A writ of error was brought of this judgment in *B. R.* and the case argued, but no judgment appears, nor are the reasons before-mentioned taken notice of in the report; but yet they seem easily deducible from the report, and are the chief reasons (as it should seem) upon which the judgment in *C. B.* could be founded.

A. tenant for life, remainder to *B.* in tail, *B.* lets to *C.* for years, to commence after the death of *A.*, then *B.* suffers a recovery to *D.* and dies; the lease for years holds good against *D.* In this case it must be intended, that the recovery was suffered after the death of *A.*, for during his life *B.* was not tenant to a *præcipe*; then admitting the recovery to be after the death of *A.*, this was after such time as the lease took effect against *B.* so as to be absolutely binding upon him; and when he afterwards suffers a recovery, this bars the estate-tail, in respect of which only the lease was violable, and, by consequence, the recoverer, who has not that estate-tail, must hold subject to the lease, and can no ways avoid it.

So tenant in tail, with power to make leases, &c. made a lease for twenty-one years not pursuant to his power, and then levied a fine, and died, leaving issue; and if the devisee should avoid

Dyer, 51. b.
in margin.

Lev. 167.
Sid. 260.
Raym. 132.
Keb. 778.

Opey and Thomasius. 4 Mod. 6. S. C. cited, and there said by Justice Dolben, that it was neither well stated nor well reported in the books; for upon the roll it was thus: A man seized in fee made a lease for 99 years, if three persons so long lived; then he settled the reversion upon himself in tail, with power to make leases for 21 years, and then he made such a lease, and died; the son, who was the issue in tail, and not the father, (as it is reported in the books,) levied a fine, and sold the reversion; the first lease determined, and the court thought the donee might avoid the second lease, because it never was in the election of the tenant in tail, or his issue, to avoid it, they having conveyed away their estates before this second lease was to commence; for

this lease, as the issue might have done, if the fine had not been levied, was the question? for the lease did not take effect during the life of the tenant in tail; and it was agreed, that (a) if tenant in tail grant a rent, or acknowledge a statute, or make a lease for years to begin after his death, that these are void as to the issue, and not merely voidable; but if tenant in tail makes a lease for years without reservation of any rent, this is not void, but only voidable, because the issue may affirm it by acceptance of fealty. And by all, except *Twifden*, the lease in the principal case was holden not to be absolutely void upon the death of the tenant in tail, but only voidable, because it was an immediate disposition of the land itself, and therefore differed from the cases of collateral charges granted thereout; and they held it to be for the benefit of the issue to have such leases only voidable; and so indeed it is, as appears by all the cases and reasons before mentioned: then this lease not being absolutely void, but only voidable, when the tenant in tail levies a fine, by which he binds the estate-tail, and bars the issue before the time of election for avoidance thereof is come; this does not make the lease indefeasible, but transfers the estate chargeable with the future lease just in the same manner it was in the hands of the tenant in tail, without any act done either to affirm or avoid it; and then the donee, when the lease is to commence in possession, must have the same election of avoiding or affirming it, as the issue in tail would have had; for if the lease was voidable, and the levying of the fine before its commencement had no influence upon it one way or other, then it must continue voidable still, and it must continue so only as to the donee; for the tenant in tail, or his issue, have nothing to do therewith, and, by consequence, if it does not continue voidable as to the donee, then he may use his power either to affirm or avoid it, as he sees most convenient: and a diversity was taken between a voidable lease by tenant in tail, which is to commence *in presenti*, and such voidable lease as is to commence *in futuro*; for (b) if tenant in tail makes a lease for years to begin presently, which is not warranted by 32 H. 8. c. 28. and, consequently, is voidable by his issue, if he in the mean time conveys over the land by fine, the donee shall hold subject to that lease, and shall never after avoid it, because the lessee was then actually in possession of his lease, and so that possession divided and taken out from the inheritance which the donee purchased; and then the right of entry, which would have come to the issue, and was necessary to the avoidance thereof, cannot by the fine be transferred to the donee, who is a stranger; and the issue is bound by the fine from making any use of that right of entry, and, by consequence, the lessee shall take advantage thereof, and hold his lease without avoidance from either; but where such voidable lease is to commence *in futuro*, and before the commencement of it the tenant in tail levies a fine to a stranger, there the election to avoid or continue it passes incorporated in the fine, and it cannot be said to be either a right of entry or a right of action; for the lessee not being yet in possession, no entry is needful or can be made to avoid his lease, and the fine has no effect upon it one way or other,

other, but leaves it just as it was; and, by consequence, being voidable after the fine as much as it was before, the conusee only can use the power of avoiding or continuing it, since the issue is bound by the fine, and has nothing to do with it, and it must continue the same after the fine as it was before, because the time for its commencement was not then come; and it could not be either affirmed or avoided before it had a beginning; and so it should seem to be: and for the same reasons, where tenant in tail makes a lease for years, to begin expressly after his death, this is not absolutely (c) void by his death, but only voidable, notwithstanding the opinion at the beginning of the case.

if tenant in tail makes a lease to commence in presenti, and conveys away his estate by fine, the conusee must hold it charged with such lease; *secus*, where it is to commence in futuro, because it cannot be avoided before its commencement; but no judgment was given. (a) *Vide* Cro. Jac. 455. Griffin and Stanhope. (b) For which *vide* 2 Lev. 27, 28. Mod. 109. Benson v. Baron and Hudson. (c) But *quære*, & *vide supra*.

Tenant in tail of a manor before 27 H. 8. c. 10. made a feoffment in fee to his own use, and died, and in the time of the issue the statute of uses is made, and after the issue makes a lease for years of a tenement, parcel of the manor, rendering rent, and dies, whereby his issue was remitted by the descent of the fee and freehold in law, without entry, though the first issue was not remitted, by reason of the statute of uses, which executed the possession in the same manner as he had the use (and that was in fee) before entry; and his issue makes a feoffment in fee of the manor, and livery in another part, not in the tenement leased, in the name of the whole: and if this was a discontinuance of this tenement, was the question? *Coventry* was of opinion it was not, because the issue who made the lease granted it out of the fee and right of the tail, which was in himself at the time of the lease made; and therefore by the remitter of his issue the lease was not void before entry, but only voidable; for he might have made it good by acceptance of the rent from the lessee; and, by consequence, if this was a lease continuing at the time of the feoffment of the manor, this tenement could not pass by the livery made in another part of the manor. But at last the whole court held, that this tenement passed by the feoffment, because by the remitter of the issue the lease for years was absolutely defeated and gone, and the lessee become tenant at sufferance; and if the issue had accepted the rent, this would not have made the lease good, because the reversion and inheritance, out of which it was derived, was by the remitter vanished and gone; and then the continuance in possession of the tenant at sufferance at the time of the feoffment of the manor is no impediment to the operation of the livery upon that tenement, and therefore the remitter destroyed the lease in this case.

Tenant in tail, reversion in the crown, makes a lease for years, rendering rent, and dies, leaving B. his son and heir in tail, who accepts the rent, and hath issue C.; then B. commits treason, and is attainted thereof, and by act of parliament all his lands and possessions are forfeited, and given to the king; and if the king was concluded by this acceptance of the rent by the issue so that he shall be adjudged in by him, and could not avoid the lease so long

Roll. Rep. 260. Bridgman and Charlton.

Dyer, 107. b. 115. a. 332. b. Plow. 560. Hob. 324. 346. Cro. El. 2. 519. Yelv. 150. Godb. 374. 2 Roll. Rep. 471.

as there was any issue in tail, was the question? And it was adjudged, that by the attainder the estate-tail was determined, and the king in, in point of reverter, and then all leases, charges, &c., of the tenant in tail are determined as if he were dead without issue; the reason whereof, given in the books, is, that if it should be otherwise, the king would have two fees in him, which the law will not allow; and this may be a good reason; but it is such a one as wants another reason to explain it; for the same books agree, that if tenant in tail with the reversion in the king had made a lease for years, and after had levied a fine to the king, that the king in that case should not avoid the lease for years, no more than he should if the remainder in fee had been in a stranger, or in the tenant in tail himself, and yet in these cases the king hath two fees in him, and the law allows them to consist well together; therefore the reason of the difference between the cases seems to be, that where the reversion is in the crown, the crown, by consequence, must be the donor, and give out the estate-tail: now all donations created a tenure between the donor and donee, to which homage, fealty, and other duties and services were incident and annexed, as the conditions whereby the tenant was to hold and continue the enjoyment of his land. Now treason was the greatest violation possible of these duties of fidelity, obedience, and service, whereto the tenant was obliged, as the very terms and conditions upon which the king at first was prevailed upon to give him the land, and which he, when he accepted thereof, undertook to observe, by the solemnity of an oath; so that when the donee commits treason, he breaks the condition whereby he holds his estate, and the king is in for that condition broken, and, by consequence, his title by virtue of that condition is paramount all leases, grants, or charges of the tenant in tail: for they being derived out of his conditional estate can subsist no longer than that does, and by his attainder of treason the condition is broken, and that estate forfeited and gone to the king in reversion who gave it; and, by consequence, all derivative leases or charges thereout are determined likewise: but now when the king has only the remainder in fee, there is no immediate tenure of the king, nor is the tenant obliged to any particular duties or services of homage or fealty to the king, as annexed to his donation, more than any other of his subjects; for he had not his estate of the gift of the king, but of his own immediate donor; and then though the law has given the forfeiture of all estates for treason to the king, of whomsoever held, yet this is a positive law, introduced but lately, and the king in such case is in under or by way of conveyance of the estate-tail, and his title thereto begins but from the time of the treason committed, and, by consequence, he shall hold subject to all leases or charges made by the tenant in tail before that treason committed, as the tenant in tail himself should have done: and in the principal case, where the issue in tail by acceptance of the rent had made good the lease of his ancestor, as against himself, if the remainder in fee had been in the crown, and the issue in tail had been after attainted of treason, though the king should have the forfeiture, yet he should hold

hold it subject to the lease, which the issue by such acceptance had made good against himself; and it should seem likewise, that the king being a stranger, and coming in under the estate-tail, shall be bound by that lease; not only during the life of the issue who accepted the rent, but also as long as there were any issue of the body of the donee; for the king being a stranger cannot have the right of the succeeding issue to avoid it; and whether the right of entry or action, which such succeeding issue would have to avoid the lease, be transferred to the king, depends upon the words and construction of the act of parliament which gives the forfeiture in such case. So, in the case of the fine, where the tenant in tail makes a lease for years, and after conveys the lands by fine to the king, though the king in that case was the immediate donor, and had the reversion in him at the time of the fine levied, yet he should be bound by such lease, because the fine was only a conveyance of record, and passes the estate to the king, as it would do to any other person, and, consequently, the king shall take subject to that lease, as any other person must do; and in the principal case, *where the reversion was in the crown*, though the lease for years had been in every thing warranted by 32 H. 8. c. 28. and the issue in tail after the death of his ancestor had accepted the rent, and then been attainted of treason, yet the king should hold discharged thereof; because by the attainder the estate-tail was forfeited, determined, and gone, as if the tenant in tail had died without issue, and the king was in of his old or immediate reversion.

If tenant in tail makes a lease for years, and dies without issue, the lease is absolutely determined by his death, though it were in all things pursuant to the 32 H. 8. c. 28. so that no acceptance of the rent by him in the remainder or reversion can make it good; for the estate, out of which it was derived, being determined, that likewise must fall off with it; and the intent of the statute was only to enable the tenant in tail by such leases to bind his *issue*, which in no case before he could do, not to bind or any ways affect those in *remainder* or *reversion* after the estate-tail determined.

So, if tenant in tail makes a lease for three lives according to 32 H. 8. c. 28. this is no discontinuance, but determines with the estate-tail; and where *Cro. Car.* 156. *Salwin* and *Clerk* holds that it is a discontinuance, all the other (a) books are against it; and (b) *Vaughan* says, that case is all false and misreported, and that such lease being warranted by the statute cannot be a discontinuance; because the parliament, to which every man is party, allows of such leases; which, if they were tortious, as all discontinuances are, the parliament would never have allowed; and, therefore, if a warranty was annexed to such lease, yet it would make no discontinuance, because that determines with the estate likewise.

But if such lease for three lives were not warranted by 32 H. 8. c. 28. then it would be a discontinuance, because it was a greater estate than the tenant in tail had power to make, and passed by livery, which took out the estate from the tenant in tail, and turned

8 Co. 34.
Moor, 133.
Co. Lit.
44. a.
Cro. Eliz.
602. Bro.
tit. *Acceptance*, 19.

(a) As 3 Co.
34. a. Cro.
Eliz. 602.
Co. Lit.
333. a.
Noy, 66.
Sav. 77.
(b) *Vaugh.*
383.

3 Co. 50.
9 Co. 140. b.
2 Roll. Abr.
59. Walter
and Jackson.

turned it into a reversion in fee, determinable upon three lives : so, if such lease for three lives, not warranted by that statute, were made of parcel of the demesnes of a manor, and then the tenant in tail should lease for life, or convey the manor in fee to another, and the lessee attorn, yet the reversion thereof would not pass, because the first lease was a discontinuance of that parcel, so as the reversion thereof for the time was no parcel of the manor.

Cobb. 9.
Pl. 12.

Tenant in tail, the remainder in fee, the tenant in tail makes a lease for lives, according to 32 H. 8. c. 28. and after dies without issue, and before any entry he in the remainder grants over his remainder by fine ; and if the conusee of the fine might enter upon the lessee and avoid his lease, was the question ? *Fenner* argued that he could not, because where a freehold is given by livery, it cannot be defeated without entry ; and cited a case where a man made a lease for life, remainder in fee, the tenant for life granted over his estate ; then a *formedon* was brought against the grantee or assignee, and the tenant for life died, pending the suit ; and it was holden by all the justices, (except *Littleton* and divers serjeants,) that the writ should not abate, unless he in the remainder had entered : so here, and then when before entry, he in the remainder grants over his remainder, the grantee shall have it but as a remainder, for so is his grant, and so the estate of the tenant for life, which was not voidable, is made good ; and of this opinion were *Wyndham* and *Periam* : but *Mead* and *Dyer* held, that, by the death of tenant in tail without issue, the lease made by him, though for life, was absolutely void, and not merely voidable, because by his death without issue, the estate, out of which the estate for life was derived, is determined and gone ; and so must the estate for life be also, for *cessante causa cessat & effectus* ; and this seems the better opinion and most consonant to the cases before put ; for the death of the tenant in tail, without issue, was, in law, as much a determination of the lease for life, as if it had been expressly so limited ; and then, when that time comes, the operation of the livery, and the end for which it was made ceases, and there needs no entry to avoid that which by effluxion of time and operation of law is already spent and run out ; and therefore the conusee of the fines comes immediately to the possession both in law and right, and the lessee's continuance of possession after is a wrong and trespass to him, and cannot be by force of the lease which is run out and expired, and, by consequence, must have determined the operation of the livery with it.

Jon. 61, 62.
2 Roll.
Rep. 498.

But if tenant in tail makes a voidable lease for years or life, and dies, and the issue, before entry on the lessee, levies a fine to a stranger, the conusee shall not avoid the lease, because such lease being only voidable by entry, when the issue before entry conveys over the land by fine, the power of entry, which was the only means of avoiding such lease, is by the fine destroyed and gone ; for a right of entry cannot be transferred to a stranger, any more than a right of action : so, if the tenant in tail him-

self,

self, after such lease, had levied a fine to a stranger, or even to the reversioner, and died, yet they could not avoid the lease ever after, because if they could, it must be by reason of the right of entry transferred by the fine, which would have come to the issue if no such fine had been levied; and the law absolutely condemns all alienations of right only, whether it be right of entry or of action, and consequently in these cases, by such alienation, the lease is become absolute and unavoidable.

A woman, tenant in tail, makes a lease for years, not warranted by 32 H. 8. c. 28. and after takes husband, and they have issue, and then the wife dies; the issue cannot avoid this lease during the life of the husband, because he is tenant by the curtesy of the freehold and reversion expectant thereupon; and though he should surrender his estate by the curtesy to the issue, yet this would not help him to avoid the lease till his death, because his estate, as tenant by the curtesy, is a continuance of his wife's estate, and so long as that lasts, the issue's time for avoiding the lease is not come, and notwithstanding the surrender, yet as to the lessee, who is a stranger, the estate by the curtesy has still an existence and continuance, as if no surrender had been made; for he being a stranger shall not suffer by such voluntary act of the tenant by the curtesy; and (a) *Walsh* was of opinion, that the power of avoiding such voidable leases runs so in privy to the issue in tail, that if such issue should marry, and his wife, after the death of the ancestor in tail, be endowed of the reversion of the lands in lease, that she should not avoid the lease, as her husband, the issue in tail, might have done; because though she be in, in consequence of the estate-tail, yet she is not privy to her husband as to that purpose. Also, it was further held in the principal case, that if the woman, tenant in tail, had before marriage acknowledged a statute, and then married, and died, that this statute should be extendible in the hands of the tenant by the curtesy, and of the issue too, if he came in by surrender of the tenant by the curtesy during his life; but if after such statute the woman had made a lease for years, rendering rent, and then married, and died leaving issue, the statute should not be extended upon the lessee; for as the statute was absolutely void and determined as to the issue, and the lease voidable by him likewise, the statute shall never be set up against the lessee, though the issue in tail thinks fit to wave his power of avoiding the lease; for then that would take away from him the rent, which might be the chief inducement that prevailed on him to affirm such lease; or if such lease were in all respects warranted by 32 H. 8. c. 28. and so not voidable by the issue; yet since the statute fell off, and became void by the death of the tenant in tail, as to the issue it shall never take place against the lessee, because that would take from the issue the rent, which 32 H. 8. c. 28. never intended to permit, but on the contrary, made the issue's enjoyment of the rent the principal reason of their investing the ancestor with power by such lease to bind the issue.

Dyer, 46. b. in margin.
51 b. in margin.
363. b. Co. Lit.
326. a.
338. a. b. & vide Moor, 36.

(a) In 2 Bendl. 65. but

But

2 Roll.
Rep. 499.
Mod. 110.

But if tenant in tail grants a rent-charge, and after makes a lease for years, or lives, warranted by 32 *H. c.* 28. the lessee shall hold the land charged during the lease, not only in the lifetime of the lessor, but also after his death; by *Jones and Yelverton*: For this rent-charge meddles not with the possession, as the statute in the other cases does; and therefore the lessee, in respect of the possession which he hath, shall be liable to pay the rent reserved to the issue; whereas in the other case, if the statute should prevail, this would deprive the issue from distraining for the rent, by divesting the lessee of the possession whereon the distress ought to be made.

2. What Leases Tenant in Tail may make to bind his Issue, since the 32 *H. 8. c.* 28.

Co. Lit. 44. Here we shall premise, that the statute 32 *H. 8. c.* 28. is an enabling statute, and was made purposely to give the tenant in tail (amongst others) power, by observing the directions therein specified, to bind his issue; so that they shall not now, after his death, avoid such leases as they might have done before by the common law, which was found to be very inconvenient, and a great discouragement to farmers and lessees, who, after they had paid great fines, and been at great costs and charges in building, and otherwise improving the lands and tenements so leased to them, were, after the death of their lessors, cruelly expelled and put out (as the statute speaks) by the heirs of the lessors, by reason of private gifts in tail, &c. to their great impoverishment and undoing; therefore to prevent such mischiefs for the future, that statute provides, that all leases to be made of any manors, lands, tenements, or other hereditaments, by writing indented, under seal for term of years, or for term of life, by any person or persons being of full age of twenty-one years, having any estate of inheritance, either in fee-simple or fee-tail, &c. shall be good and effectual against the lessors and their heirs, &c. provided that the said act shall not extend to any leases to be made of any manors, lands, &c. being in the hands of any farmer or farmers, by virtue of an old lease, unless the same old lease be expired, surrendered or ended, within one year next after the making of the said new lease; nor to any grant to be made of any reversion of any manors, lands, &c. nor to any lease of any manors, lands, &c. which have not been most commonly letten to farm, &c. by the space of twenty years next before; nor to any lease to be made without impeachment of waste, or which shall exceed the number of twenty-one years, or three lives, from the day of the making thereof; and that upon every such lease there be reserved yearly, during the same lease, due and payable to the lessors and their heirs, &c. to whom the said lands, &c. after the death of the lessors, would have come if no such lease had been made, so much yearly farm or rent, or more, as had been most accustomedly yielded or paid for the manors, lands, &c. so letten within twenty years next before such lease thereof made, &c.

These

These are the several qualifications requisite to all leases to be made by tenant in tail to bind his issue within the statute, the particular branches whereof being considered under the next head, letter (D), I shall here only mention some scattered cases, not so easily reducible to the method there used.

Tenant in tail, to him and the heirs male of his body, had issue two sons by divers venters, and died, the eldest son entered and made a lease for twenty-one years, reserving rent generally to him and his heirs and assigns, and died without issue, leaving two sisters, his heirs at law; and if by this reservation the rent belonged to the second brother, to whom the reversion descended as heir male of the body of the father, was the question? for if not, then the lease could not bind him within 32 H. 8. c. 28. and it was strongly urged, that the rent could not go to him, because he was neither heir general nor special to the lessor; that the reservation being to the heirs of the lessor, it could not go to the brother of the half blood: but, notwithstanding, it was adjudged to be a good lease, and that the rent should go along with the reversion; for the words of the statute are, that the rent shall be reserved to the lessor and his heirs, or *to those to whom the lands would go if no such lease had been made*; and judges are to expound statutes, so as not to frustrate the design and intent of them; and here the intent was, that *the rent should go along with the reversion*; and so it may here, for the rent naturally follows the reversion, and the second brother is heir to the entail and reversion, though not to the lessor, and heirs *dicuntur ab hereditate*, and therefore shall be taken *secundum subjectam materiam*, & *ut res magis valeat*, to comply with the intent of the statute; and they cited (a) *Austen's case* as a case in point, and so judgment was given accordingly.

Hard. 89.
Cother and
Merrick.

(a) Dyer,
115.

Two coparceners tenants in tail, the husband of one of them, after her death, being tenant by the curtesy, joins with the other in a lease for years, rendering rent to them and their heirs: this was held no good lease within 32 H. 8. c. 28. because it is not reserved to the donee and his heirs, but to the tenant by the curtesy, jointly with the other; for rent goes strictly as it is reserved by the lessor, and not otherwise; and perhaps as this reservation is, if the tenant by the curtesy should survive, the whole rent would go to him by survivorship, and so the issue of the other coparcener have no recompence for his part of the lands leased; or if the rent should not survive, in regard of their several interests in the lands leased, yet since heirs, in case of the coparcener who joined, must be intended heirs of the body, to bring it within 32 H. 8. c. 28.; so must it likewise be in the case of the tenant by the curtesy, and that may not happen to be the issue inheritable by force of the gift, because he may have issue a son by a former venter, who would be heir of his body; and therefore this seems to differ from the former case, because the same word *heirs*, being applied to both indifferently, cannot be intended to mean one sort of heirs in one case, and another in the other; and the tenant by the curtesy can have no heirs of his body inheritable as heirs of his

Latch. 45.
Thompson's
case.

his body to the entail, for he had no estate-tail in him; and therefore heirs of his body, if it should be so construed, cannot be restrained or governed by the same reasoning as will prevail in the case of the coparcener.

Palm. 484.
Litch. 257.
Stacy v.
Clerke.

So, if tenant by the curtesy, and the heir in reversion in tail join in a lease for years, rendering rent to them and their heirs; this lease is not warranted by 32 H. 8. c. 28. by reason of such general reservation, which will carry a moiety of the rent, at least, to the heirs general of the tenant by the curtesy, and so may cut off the issue in tail from that recompence the statute intended them as the consideration of their ancestors being allowed by such leases to bind them.

Godb. 102.
Pl. 119.

Lands were given to baron and feme, and to the heirs of their two bodies; the baron dies, leaving issue by his wife, who makes a lease for years according to 32 H. 8. c. 28. and if this lease was good by that statute, was the question? The objection against it was, that the statute says, the lease shall be good against the lessor and his heirs, and the issue does not claim as heir to the wife only, but as heir to them both; but *Wyndham* and *Rhodes*, Justices, agreed clearly, that the lease should bind the issue within the intent of that statute, for between baron and feme there are no moieties, and the wife surviving is perfect and absolute tenant in tail, and, consequently, may make all such leases as that statute empowers tenants in tail to make.

Dyer, 123.
304. a.
Pl. 53.
2 Roll. Rep.
403. 407.
Ley. 78.

Tenant in tail makes a lease for years, rendering 20 s. rent, and after releases all the rent except 12 d. and dies, and his issue accepts the 12 d., and the question was, if thereby he were concluded to distrain for the other 19 s. reserved upon the lease? And *Sanders* and *Catlyn* were of opinion that he was concluded, but *Whiddon* and *Dyer contra*; and put this case, that if the lessor after such lease, should grant to the lessee that he should hold his lease without impeachment of waste, yet the issue may maintain an action of waste against him, of which there seems no doubt; or that the issue, if he had not accepted the 12 d., might have distrained for the whole 20 s.; for if such release, either of rent or waste, should prevail, the statute 32 H. 8. c. 28. would be totally eluded; but it should seem, the issue's own acceptance of the rent hath concluded him, for his own time, to distrain for any more.

Hard. 93.

If tenant in tail makes a lease for years, reserving the usual rent to his issue, without any reservation to himself, this is not pursuant to the words of the statute; yet *Fleming*, Chief Justice, held it to be a good reservation, and the lease not voidable, for this reason, within 32 H. 8. c. 28. because the issue, for whom the statute chiefly intended to provide, sustains no prejudice.

3 Co. 64. b.

An estate is made to husband and wife, and the heirs of the body of the husband, the husband makes a lease for forty years, rendering rent, and dies, the issue accepts the rent, yet this shall not bind him, because his time for acceptance thereof was not come, the whole being vested in the wife for her life by survivorship.

Tenant in tail makes a lease for *twenty* years, rendering the usual rent, *habendum* from *Michaelmas* next ensuing: this seems a good lease, though it did not begin from the making of the lease, according to the proviso 32 *H. 8. c. 28.* for the intent of the statute was only that the lease should not exceed the number of twenty-one years from the making, which this lease did not; and the case of (a) *Thompson and Trafford*, 35 *Eliz.* in *B. R.* was cited, where such a lease was adjudged by the whole court to be good, and well warranted by the statute; though my Lord *Coke* lays it down for one of his (b) rules, that leases upon that statute are not good, if they do not commence from the day of the making, which perhaps may be reconciled upon the same diversity, where they are under twenty-one years, and where not so; that from the time of the sealing and executing the lease, till the expiration thereof, there does not intervene more than twenty-one years; for if the commencement of the lease be at such a distance, that between the time of the sealing and executing thereof, and the expiration, there do intervene above twenty-one years, then such lease seems to be without any aid from this statute, though the time for continuance thereof in the possession of the lessee be under twenty-one years; for otherwise the tenant in tail might so procrastinate the commencement of the lease, as to have always the greatest part of the twenty-one years running out in the time of his issue, which the statute never intended to countenance.

So, where one made a lease for ten years, and after made another lease for eleven years, both these leases are good, because they do not in all exceed twenty-one years, and so the inheritance not charged with more than a lease for twenty-one years, which the statute allows.

Leases by tenant in tail, or husband seized in right of his wife of copyhold lands, are not within this statute of 32 *H. 8. c. 28.* but remain perfectly as at common law.

Tenant in tail made a lease to a feme covert for life, the husband surrenders, and then the tenant in tail makes a lease for three lives and dies; the wife, after the death of her husband, entered, claiming her lease, and dies; and (c) held, that the issue shall not avoid the lease for three lives: and yet a conditional surrender of a former lease hath been expressly held not to be a sufficient surrender to make good any new lease to be made by virtue of this statute; *quare* therefore the difference.

3. When and in what Cases the Issue in Tail, or Strangers, shall be bound by voidable Leases made by Tenant in Tail.

As this has already been in some measure cleared under the first branch of this head, there remain but a few cases here to be inserted.

Baron and feme, tenants in special tail, with reversion in fee to the baron, the baron dies; *A.* his son and issue in tail having also the reversion in fee, by indenture, in the lifetime of the wife, makes a lease to *B.* for forty years, to begin after the death of the

Dyer, 246. a.
Leon. 148.
& vide
2 *Bendl.* 74.
pl. 58.

(a) *Poph.* 8.

(b) *Co. Lit.*
44. a. 45. b.

Leon. 148.

Cro. Car.
44.

Moor, pl.
1084.
Sydnam and
Capps.
(c) 5 *Co. 2.*
Co. Lit.
44. b.

2 *Bulf.* 42,
43. *Errington v. Errington.*
4 *Mod.* 3.
S. C. cited.

wife, rendering rent, and dies without issue; *C.* his sister, to whom the reversion descended in the lifetime of her mother, levies a fine *come coo, &c.*, with proclamations to *J. S.*, then the wife, tenant in tail, dies; and if *J. S.*, the conusee of the fine, was bound by this lease, was the question? no judgment is given in the case, but the opinion of the court, upon the first and second argument, seemed to be, that the conusee could not avoid this lease; and the reason they went upon was, because this lease, at first, took its effect out of the estate-tail by way of conclusion, and out of the reversion in fee by way of interest; but the taking effect by way of conclusion was at an end by the death of the issue who made it, because he died before the estate-tail came to him; and so it rested barely upon the reversion in fee, which was well charged therewith; then when *C.*, the sister, inheritable likewise to both the entail and reversion in fee, levied a fine in the lifetime of the mother; this past the reversion in point of interest charged with that lease, and it likewise carried the estate-tail; (not as an estate-tail, for that none could have but the donees and their issue, inheritable by force of the gift; much less when the issue who levied it had then nothing in the entail, her mother, who had the whole estate-tail in her, being then living;) but it passed the estate-tail by way of bar or extinguishment, so that the lease which would have taken place out of the estate-tail by way of conclusion, if it had ever come to the lessor, and which did take place out of the reversion in point of interest, now that the estate-tail is put out of the way by virtue of the fine, then takes place out of the reversion presently, and by consequence the conusee, who has that reversion by conveyance subsequent to the lease, must hold it subject thereto; and the sister could not by the fine convey over the possibility of avoiding the lease, which she herself would have had if the estate-tail had come to her. And some held, that if either the brother or sister, after the father's death, had acknowledged a statute, and then after levied the fine, and then the mother had died, that the estate-tail would be so barred and gone, *quoad* the conusee of the statute, that he might lay on his statute against the conusee of the fine, who hath the fee-simple absolute in him, out of which the lease or statute were to take place; and the issue in tail only is inheritable to the privilege of avoiding such charges by virtue of his estate-tail, not the conusee, who is a stranger, and cannot have that estate. But afterwards when *Coke* came to be chief justice, he was clear of opinion, that the conusee of the fine was not bound by this lease, for he held the lease to be clearly and absolutely void as against the sister and her conusee, and not merely voidable; indeed if the son had come to the estate-tail, it would have bound him, and so it would his conusee, if he had levied the fine in the life of his mother; but he dying in the lifetime of the mother, who was perfect tenant in tail, the sister was not at all bound by this conclusion, but the lease, as to her, was absolutely void; and then of all *void charges a stranger* may take advantage, though of such as are only *voidable, privies only*, and *not strangers*, can take advantage. And

he divided the case, and put it as if the reversion in fee had been in the donor, and such donor had made a lease for years, or granted a rent-charge, and then the issue in tail, in the life of the tenant in tail, had levied a fine, and then the tenant in tail had died, clearly the conusee of the fine should hold the land so long as there were any issue in tail; for during that time the conusee hath a fee-simple; and though the issue in tail here had the reversion in fee, which he passed to the conusee, together with a fee determinable on the failure of issue, and that the conusee cannot have two fee-simples in him, yet he hath such a fee-simple as shall be discharged of the lease during the continuance of the estate-tail, if it had not been barred, and the one fee-simple shall not determine or drown the other, but both shall have continuance *quoad* strangers, as if they were in several and distinct persons. And he also held, that if the daughter in this case had entered, and accepted the rent, yet clearly this acceptance would not have bound her, or made good the lease, because, as to her, it was absolutely void, and not merely voidable; and this seems the most reasonable opinion; but no judgment was given, but the case ended by agreement.

A., tenant in tail, with reversion to himself in fee, makes a lease for 99 years, if two lives should so long live, to commence after the determination of a lease for years then in being; *A.* dies, leaving *B.* his eldest son and heir, who being the issue in tail levied a fine to the use of himself and his heirs; the first lease determines, then *B.*, enters upon his father's lessee; and if his entry was lawful, was the question? and it was adjudged, that it was not; for this was an interest derived out of the estate-tail, and also out of the reversion, and being made by tenant in tail was not absolutely void as against his issue, but only voidable; then when the issue, without taking the advantage the law gave him in respect of his estate-tail to avoid this lease, levies a fine of the estate, his estate-tail by such fine is extinguished or barred and gone, and, by consequence, his power to avoid this lease in respect of that estate-tail is gone likewise; and the conusee has no power to avoid it, because he is a mere stranger, and no ways in privity of the estate-tail; nor could this power to avoid the lease be transferred to the conusee, when the issue in tail had it only in respect of his estate-tail, which is now barred, or rather extinguished, as it was held to be, and so the lease took place of the reversion in fee. *Note*; This case seems to differ from that of *Berrington's supra*, where the son, who had made the lease, died without issue in the lifetime of his mother, who was perfect tenant in tail.

Husband and wife tenants in special tail, with remainder to the husband in fee, by conveyance made by the husband, during the coverture have issue a son, the husband dies, the son in the lifetime of his mother levies a fine to the use of himself and his heirs; the wife after makes a lease for twenty-one years without reserving the antient rent, and so not warranted by 32 *H. 8. c. 28.* and dies, the son hath issue, and by his will devises these lands to the defendant, and dies, the defendant enters upon the lessee, who

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brings

Symonds v.
Cudmore,
4 Mo. 1.
Salk. 338.
pl. 3. S. C.
Carth. 257.
258. S. C.
Show. 370.
S. C.
3 Danv. 196.
pl. 10, 11.
S. C.
Skin. 284.
317. 328.
S. C.
3 Salk. 335.
S. C.
12 Mod. 32.
S. C.
Holt. 656.
pl. 1. S. C.
1 Freem.
503. S. C.

Roll. Abr.
842.
Jon. 60.
Hutton, 31.
Cro. Jac.
628.
2 Roll. Rep.
490. 493.
Croker and
Kelsey.
Sid. 52.

Keb. 182.
S. C. cited.

brings ejectment; and it was adjudged in *B. R.* for the plaintiff, and that judgment afterwards affirmed in error in the exchequer-chamber, after divers arguments; and in the case two points were made: 1. If this lease, being made by a jointress within 11 *H. 7. c. 20.* and not warranted by 32 *H. 8. c. 28.* be voidable by the issue in tail, upon the statute 11 *H. 7. c. 20.* in case no such fine had been levied? 2. If the conusee of the fine should have the same power to avoid the lease, either in respect of the estate-tail or the remainder in fee, as the issue should have had, if no such fine had been levied? As to the first point, it was resolved, that this lease was not within the 11 *H. 7. c. 20.* for it was no discontinuance, but only an ordinary lease for years, which the wife might survive; and therefore this differs from a lease for life or lives made by a sole jointress, not warranted by 32 *H. 8. c. 28.* for that makes a discontinuance presently, and is expressly within 11 *H. 7. c. 28.* also this differs from the case put in (a) Sir George Brown's case, that if a woman jointress in tail accepts a fine come ceo, &c., and grants and renders the land for 500 or 1000 years, to evade the act, that yet this is an alienation within the meaning of that act, as much as if she had expressly levied a fine for 500 or 1000 years, because in both cases, after her death, such fine would bind the issue in tail, which that statute intended to prevent; but because such fines passing only an interest for years, and not meddling with the freehold, make no discontinuance, nor can be forfeited with collateral warranty, therefore during the life of the jointress they continue good, she continuing still tenant in tail, as she was before, at least in case of the fine levied by her for years; but after her death the issue in tail may avoid them, because otherwise they would be prejudicial to him in binding his inheritance, and so would be equivalent to a discontinuance; and therefore after the death of the jointress in such case the issue in tail may avoid them by 11 *H. 7. c. 20.* but not before; but this lease for twenty-one years being made in the ordinary form, by indenture, is not within the statute 11 *H. 7. c. 20.* and therefore if the jointress in this case had made a lease for 100 or 1000 years by indenture only, this would be no alienation within 11 *H. 7. c. 20.* because the issue might avoid it by the statute *de donis*; so that there appears a manifest difference between leases for life or lives, and leases for years, and also between leases for years made by fine, and leases for years made only by indenture or deed poll; but if such lease, either for lives or years, were in all things warranted by 32 *H. 8. c. 28.* then they would be good and binding upon the issue. As to the second point, if the conusee of the issue in tail should have the same power of avoiding the lease, either in respect of the estate-tail or the remainder in fee, as the issue himself should have had if no such fine had been levied; it was resolved, that he should not, but that the lease was good, and unavoidable; for notwithstanding the fine levied by the son, the mother continued perfect and absolute tenant in tail; and therefore the lease made by her would not have been absolutely void against the issue, but only

(a) 1 Co. 51.
2 Roll. Rep.
491. & vide
3 Keb 333.
436. 448.

voidable, if he had levied no fine; but now having levied a fine, this hath barred the issue and the entail, so that the issue himself cannot avoid this lease; for he hath nothing to do with the entail; and the conusee cannot avoid it, because he is a stranger to the entail, which could not be transferred to him by the fine, but only be extinguished as an estate-tail; and the statute *de donis* helps only the issue and those in reversion or remainder; and though the fine carried likewise the remainder in fee, and after the death of the wife the entail was not *in esse*, but determined; yet this was only between the conusor and conusee; for as to the feme, and all strangers, the estate-tail continues so long as there is any issue, and no diversity when the fine of the issue is precedent to the lease, and where subsequent; for the lease is good against all but those who were aided by the statute *de donis*; and when the issue in tail by his own act hath extinguished or barred the estate-tail, and destroyed the privity, the lease continues good and unavoidable so long as any of the issue in tail are in being: and if the feme in this case, after the fine levied by the issue, had made a feoffment in fee, and died, the feoffee should have held the land against the issue and his conusee, so long as there were any issues in tail. And if tenant in tail makes a lease for years, and after levies a fine to him in the reversion, and dies, leaving issue, though in this case he in reversion shall be in of his antient reversion, yet he shall not avoid the lease during the lives of the issues in tail; for as to strangers, the estate-tail hath continuance in right, though as to other purposes he shall be in of an estate in fee; and therefore the difference between this and Sir George Brown's case is, that the lease there for three lives was a discontinuance, and then 11 H. 7. c. 20. gives title of entry to him to whom the interest after the death of the feme should appertain to avoid it; but here this lease for years was no discontinuance, nor at all within that statute; and then it remains at common law, where none but the issue in privity of the estate-tail, or those in reversion or remainder, shall avoid it; and here the estate-tail, as to all strangers, hath continuance, and then the issue cannot avoid it, because he hath no estate-tail; nor the conusee, because a stranger to the entail; and so the lease remains absolute and unavoidable.

If tenant in tail makes a future lease, and dies before it is to commence, such lease is merely void, without more circumstances; but the issue in tail has his election to make it good by accepting the rent, or by distraining and avowry, which amounts to an admittance of the lease, and so estops and concludes the issue to deny it; so that the election of the issue in that case is only to support and make good the lease of some act of his own conclusion, and not an election to avoid it by his own act, because there is no such act necessary; for the law esteems it void *ipso facto* by the death of the tenant in tail, unless the issue doth by some act make it good.

Where leases are voidable only, the same may in some cases be avoided by one person, and yet revived and made good by another, and in some cases an avoidance of such leases by one person con-

Carth. 260, in the case of Symonds and Cudmore, by Holt, C. J. against the three others, who doubted.

cludes all others to revive or set them up again ; wherein the diversity is between those who at the time of the avoidance have the absolute fee and inheritance in them, and those who have only a temporary and particular estate or interest therein.

7 Co. 35.
Co. Lit.
46. a.

Therefore, if tenant in tail, or bishop, make a lease for years, not warranted by the statute, so that the issue in tail or successor may avoid them, if during these leases the temporalities come into the hands of the king by the vacancy of the bishoprick, or the wardship of the issue, and his lands come to the king, or any other, upon the death of the tenant in tail, by reason of a tenure by knight's service ; in these cases the king, or other guardian, may avoid these leases in right of the bishoprick or issue, whether made by the ancestor within age, or by the ward himself ; but yet the successor, or issue, when they come to the actual possession of these lands themselves, may by the acceptance of the rent, &c., and waiver of the possession, re-establish and set up such leases again : so, where the king for his *premier seisin* avoided a lease for years made by a tenant in tail, yet it was adjudged, that after livery had, the issue in tail had election either to defeat or abide by such avoidance ; and therefore if he accepted the rent from the lessee, and waived the possession, this set up the lease again.

7 Co. 9.
Co. Lit.
46. a.

So, if the wife of tenant in tail being endowed of those lands, avoids a lease made by her husband during the coverture, for thirty or forty years, yet after her death the issue in tail, by acceptance of rent, and waiver of the possession, may set up such lease again.

7 Co. 9.
Godb. 325.

So, if tenant in tail makes a lease for thirty or forty years, rendering rent, and dies without issue, his wife *privement enseint* with a son, and the donor enters, and as to himself avoids the lease ; then the son is born, and the lessee re-enters ; the son at full age may either affirm or avoid such lease, as he thinks fit ; for the lease was not absolutely determined or avoided, more than the estate-tail itself, out of which it was derived, but only *secundum quid*, and subject to be set up again upon the birth of the issue, which revived the estate-tail ; but if such lease were made by the tenant in tail before marriage, rendering rent, and then he married, and died, leaving his wife *privement enseint*, and the donor enters, and as to himself avoids the lease, yet if the wife be after endowed, the lease is revived as against her, because her estate is *quodam modo* a continuance of the estate-tail of the husband, and therefore revives all charges made by him before the marriage. But if the wife be after delivered of a son, and die, now the issue may again avoid that lease or affirm it, as he thinks fit ; or if such lease were made after marriage, and the wife, being endowed thereof, avoid that lease, yet after her death the issue in tail may revive it ; for in all these cases the avoidance of such leases being only by those who had a temporary estate or interest in the land, cannot bind those who succeed to the inheritance thereof, but that they may, if they think fit, re-establish and set up such lease again, which, as to them, was at first only voidable, and not absolutely void.

7 Co. 8. a.
Co. Lit.
46. b.

But if a woman be endowed of an advowson, which was appropriated, during the coverture, and she present, and her presentee

be admitted, instituted and inducted, though the incumbent dies during the life of the doweress, yet is the appropriation defeated and dissolved for ever; because the incumbent, who came in by her presentation, had the whole fee and estate in him, as much as any incumbent ever can have, and, consequently, there can be no reversionary or contingent interest left to revive the appropriation: but if the wife in this case had died before any presentation, then the appropriation had remained untouched; for then nothing had been done to defeat or alter it, and make it presentable; for the actual presentation only defeats and dissolves the appropriation, not the bare power of presenting, without it be reduced into execution.

(E) Of Leases for Lives or Years by Ecclesiastical Persons: And herein,

1. What Leases they might have made by the Common Law, and of the several enabling and disabling Statutes, with some general Observations on them.

AS to leases made by ecclesiastical persons, by the common law, we shall but briefly observe, that all ecclesiastical persons had in former times as full power and authority to lease, grant, or alien their possessions, as temporal persons had, that is, if the grant, &c. made by a sole corporation was with the consent of others, whose confirmation was in such case necessary; for though deans and chapters, masters and fellows of colleges, masters and brethren of hospitals, and such like corporations aggregate, might of themselves alone, without the consent or confirmation of any, have made long leases for lives or years, or gifts in tail or fee, at pleasure; yet bishops, deans, &c. seised in right of their bishopricks, deanries, &c. so archdeacons, prebendaries, parsons, vicars, if they aliened or leased, must have had the consent and confirmation of others, that had the power of confirming in that behalf, and then their grants, &c. were as good as those made by aggregate corporations.

Comp. In-
cumb. 415.

But the law, as to the capacity of clergymen in granting, leasing, &c. being greatly altered by divers acts of parliament, and those not a little intricate and perplexed, it will be necessary to set down the statutes themselves, to render the cases reducible to them more clear and intelligible.

The first statute concerning leases by ecclesiastical persons, which is also the only statute that gives directions concerning leases by tenant in tail, or husbands seised of lands in right of their wives, is 32 H. 8. c. 28. which provides as followeth: "Where-
" as great numbers of the king's subjects have heretofore taken
" leases of lands, tenements, and other hereditaments, for term
" of years, and divers of them for term of life, and have given
" and paid great fines and sums for the same, and also been at
" great costs and charges, as well in and about great reparations

32 H. 8.
c. 28.

Leases and Terms for Years.

“ and buildings upon their said farms, as otherwise concerning
 “ their said farms; yet notwithstanding the said farmers, after
 “ the deaths or resignation of their lessors, have been, and be
 “ daily, with great cruelty, expelled and put out of their said
 “ farms and takings by the heirs or successors of their said lessors,
 “ or by such persons as have interest therein, after the deaths or
 “ resignations of their said lessors, by reason of privy gifts of en-
 “ tail, or for that the lessors had nothing in the lands, tenements,
 “ or other hereditaments so letten at the time of the leases there-
 “ of made, but only in the right of their wives, or such other
 “ like cause, to the great impoverishment, and in a manner utter
 “ undoing, of the said farmers; for reformation whereof, be it
 “ enacted, &c. That all leases to be made of any lands, tene-
 “ ments, or other hereditaments, by writing indented, under
 “ seal, for term of years, or for term of life, by any person or
 “ persons, being of full age of twenty-one years, having an
 “ estate of inheritance either in fee-simple or fee-tail, in their
 “ own right, or in right of their churches and wives, or
 “ jointly with their wives, of an estate of inheritance, made be-
 “ fore the coverture or after, shall be good and effectual in the
 “ law against the lessors, their wives, heirs, and successors, and
 “ every of them, &c. *Provided* that the said act shall not ex-
 “ tend to any leases to be made of any manors, lands, tene-
 “ ments, or hereditaments, being in the hands of any farmer
 “ or farmers, by virtue of an old lease, unless the same old lease
 “ be expired, surrendered, or ended, within one year next after
 “ the making of the said new lease; nor shall extend to any
 “ grant to be made of any reversion of any manors, lands, tene-
 “ ments, or hereditaments, nor to any lease of any manors,
 “ lands, tenements, or hereditaments which have not most com-
 “ monly been letten to farm, or occupied by the farmers there-
 “ of, by the space of twenty years next before such lease thereof
 “ made; nor to any lease to be made without impeachment of
 “ waste; nor to any lease to be made above the number of *twenty-*
 “ *one years or three lives* at the most, from the day of the making
 “ thereof; and *that upon every such lease there be reserved yearly,*
 “ during the same lease, due and payable to the lessors, their
 “ heirs and successors, to whom the same lands should have come
 “ after the deaths of the lessors, if no lease had been thereof
 “ made, and to whom the reversion thereof shall appertain, ac-
 “ cording to their estates and interests, *so much yearly farm or rent,*
 “ or more, as hath been most accustomedly yielded or paid for
 “ the manors, &c. so to be letten within twenty years next be-
 “ fore such lease thereof made; and that every such person or
 “ persons, to whom the reversion of such manors, &c. so to be
 “ letten shall appertain, as is aforesaid, after the deaths of such
 “ lessors, or their heirs, shall and may have such like remedy
 “ and advantage, to all intents and purposes, against the lessees
 “ thereof, their executors and assigns, as the same lessor should
 “ or might have had against the same lessees; *Provided* also, that
 “ this act extend not to give any liberty or power to any person
 “ to

“ to take any more farms, leases, or takings, of any manors, &c. than he should or might lawfully have done before the making of this act; nor extend to any liberty or power to any parson or vicar of any church or vicaridge, for to make any lease or grant of any of their messuages, lands, tenements, tythes, profits, or hereditaments, belonging to their churches or vicaridges, otherwise, or in any other manner, than they should or might have done before the making of this act.”

This act extends only to sole corporations, as bishops, deans, &c. but as to corporations aggregate, as deans and chapters, &c. though they be seised in right of their churches, this is no enabling statute; for they, by the consent of the major part of them, might have made any leases or grants of their estates without limitation before this statute, and so they might have done after, till by other subsequent statutes they were restrained, this being merely enabling, and not at all restraining them; and though by this statute the sole corporations before mentioned could not, without the consent and confirmation of others, have made leases for three lives, or twenty-one years, yet with confirmation they might have made longer leases, or absolute alienations, of any of their possessions; and therefore to restrain bishops, and other ecclesiastical persons, were the statutes of 1 & 13 Eliz. made, which are as follow:

For the restraining of bishops, the 1 Eliz. c. 19. says, “ That all gifts, grants, feoffments, fines, and other conveyances, or estates from the first day of this present parliament had, made, done, or suffered, or to be had, made, done, or suffered, by any archbishop or bishop of any honours, castles, manors, lands, tenements, or other hereditaments, being parcel of the possessions of his archbishoprick or bishoprick, or united, appertaining or belonging to any of the same, to any person (other than the (a) queen, her heirs and successors), whereby any estate should or might pass from the archbishop or bishop other than for term of twenty-one years, or three lives, from such time as any lease, grant, or assurance shall begin, and whereupon the old accustomed yearly rent, or more, shall be reserved payable yearly during the said term of twenty-one years, or three lives, shall be utterly void; any law, custom, &c. notwithstanding.”

(a) This statute, leaving bishops their former power of granting to the queen, her heirs and successors, was to little effect, for that many estates were granted to the queen, upon design that she should grant them over to others, to prevent

which was the statute 1 Jac. 1. c. 3. made, which disables all archbishops and bishops from granting any of their possessions to the king, his heirs or successors, and makes all such leases, grants, &c. to the king, his heirs or successors, utterly void and of none effect. 11 Co. 71. Gif. Codex. 679.

The statute which disables all other ecclesiastical persons is 13 Eliz. c. 10. which is as followeth: “ And for that long and unreasonable leases made by colleges, deans and chapters, parsons and vicars, and others, having spiritual promotions, be the chiefest causes of the dilapidations and the decay of all spiritual livings and hospitality, and the utter impoverishing of all successors, incumbents of the same; be it enacted, That from henceforth all leases, gifts, grants, feoffments, convey-

ances,

"ances, or estates, to be made, had, done, or suffered, by any
 "master and fellows of any college, dean and chapter of any
 "cathedral or collegiate church, master or guardian of any hos-
 "pital, parson, vicar, or any other, having any spiritual or eccle-
 "siastical living, or any house, lands, tythes, tenements, or other
 "hereditaments, being any parcel of the possessions of any such
 "college, cathedral, church, chapel, hospital, parsonage, vica-
 "ridge, or other spiritual promotion, or any ways appertaining
 "or belonging to the same, or any of them, to any person or
 "persons, bodies politicke or corporate, (other than for the term
 "of *twenty-one years*, or *three lives*, from the time as any such
 "lease or grant shall be made or granted; whereupon the *accu-*
 "*somed yearly rent*, or more, *shall be reserved* and payable yearly
 "during the said term,) shall be utterly void and of none effect,
 "to all intents and purposes whatsoever; any law, custom, &c.
 "notwithstanding: *Provided, &c.* that nothing herein extend to
 "make good any lease, or other grant, to be made by any such
 "college or collegiate church within either or both the univer-
 "sities of *Oxford* and *Cambridge*, or elsewhere, within the realm
 "of *England*, for more years than are limited by the private sta-
 "tutes of the same college: *Provided* also, that this act shall not
 "extend to any lease hereafter to be made, upon surrender of any
 "lease heretofore made and now continuing, so that the lease to
 "be made do not contain more years than the residue of the
 "years of the former lease, now continuing, shall be at the time
 "of such lease hereafter to be made, nor any less rent than is
 "reserved in the said former lease."

5 Co. 2.
 4 Co. 76.
 Moor, 253.
 Cro. Jac.
 112. 2 Roll.
 Abr. 466.
 Leon. 306.
 Yelv. 106.
 Mod. 205.
 2 Mod. 56.
 5 Co. 15. b.
 11 Co. 75.
 Roll. Abr.
 378. Roll.
 Rep. 151.

On these statutes we shall observe, 1. That the statute of 1 *Eliz.* c. 19. is but a private or particular statute, and must be specially pleaded, else the court will take no notice of it; but 13 *Eliz.* c. 10. is a general law, whereof the judges are bound *ex officio* to take notice, though it be not pleaded, because it extends to all ecclesiastical persons whatsoever, except bishops, who were before provided for by the 1 *Eliz.* c. 19.

2. It has been adjudged and holden in parliament, that the king was bound by 13 *Eliz.* c. 10. though not named, because the statute was general and for the publick good: but for some time the law was holden otherwise; and therefore, where a lease was made to the king by a dean and chapter, and the king had assigned it over, after that the law came to be holden that the king was bound, the assignee had his lease made good to him in Chancery against the statute, because he could not know the law in a matter so dubious.

Comp. In-
 cumb. 417.

3. That all leases made according to 13 *Eliz.* c. 10. by any single corporation, if not warranted likewise by 32 *H.* 8. c. 28. must be confirmed by those who by law are to confirm the same.

Comp. In-
 cumb. 419.

4. That these statutes of 1 *Eliz.* c. 19. and 13 *Eliz.* c. 10. are merely restraining, so that though bishops, and other ecclesiastical persons, might, with the confirmation of those required by

by law, have made any lease or perpetual grant, yet now no confirmation whatever will make them good for above three lives or twenty-one years.

5. That no lease by an archbishop or bishop for three lives, or twenty-one years, made according to the exception of 1 *Eliz. c. 19.* is good to bind the successor, if it be not in every thing pursuant to 32 *H. 8. c. 28.* unless it be confirmed by the dean and chapter; for leases for twenty-one years, or three lives, being only exempted and taken out from the general disability imposed on bishops by the first part of the act, receive no sanction at all from that act, but as they are taken out to rest upon 32 *H. 8. c. 28.* and therefore though they are for twenty-one years, or three lives, yet if part of the land were not in possession, or if the old lease were not surrendered or expired within one year before the new lease made, or in any other respect, such new lease was not warranted by 32 *H. 8. c. 28.* to bind the successor, there must be the confirmation of the dean and chapter, because at common law such confirmation was necessary; and these leases not being warranted by 32 *H. 8. c. 28.* which is the only statute that enables bishops solely to make leases to bind their successors, remain at common law, and by consequence, without confirmation, are voidable by the successors as much as if they were made for one hundred years or lives.

10 Co. 60. b.
Co. Lit.
45. a.
Moor, 108.

6. That 13 *Eliz. c. 10.* hath been always construed largely and beneficially to prevent all inventions and evasions against the true intent thereof; therefore, where the statute says, master and fellows of any college, yet it hath been often held, that be the college incorporated by that name, or by the name of warden and fellows, or warden and scholars, or warden, fellows, and scholars, or master, fellows, and scholars, or master and scholars, or provost, fellows, and scholars, or by any other name of corporation, and be the college temporal for the advancement of the liberal arts and sciences, or mere ecclesiastical or mixt, that all these are within the restraint of this act. So where the statute says master or wardens of any hospital, be the hospital incorporated by any other name, and be it a sole corporation, or corporation aggregate of many, yet the statute extends to them.

11 Co. 76.
Magdalen
College's
case.

The next statute that made any alteration in these things was 14 *Eliz. c. 11.* which as to houses in cities and towns is as followeth: "Whereas in an act made 13 *Eliz. c. 10.* there is one "branch to avoid certain leases to be made by masters and fellows of colleges, deans and chapters of cathedral or collegiate "churches, masters or guardians of any hospital, or by any other "parson or vicar, or any other having any spiritual or ecclesiastical living; be it enacted, That the said branch, nor any thing "therein contained, shall not extend to any grant, assurance, or "lease of any houses belonging to any persons or bodies politick "or corporate aforesaid, nor to any grounds to such houses appertaining, which houses be situate in any city, borough, town "corporate or market-town, or the suburbs of any of them; but "that all such houses and grounds may be granted, demised, and

14 Eliz.
c. 11. § 17.

— assured,

" assured, as by the laws of this realm and the several statutes
 " of the said colleges, cathedral churches, and hospitals they law-
 " fully might have been before the making of the said statute, or
 " lawfully might be, if such statute were not, so always that such
 " house be not the capital or dwelling-house used for the habita-
 " tion of the persons abovesaid, nor have ground to the same
 " belonging above the quantity of ten acres: provided that no
 " lease shall be permitted to be made by force of this act in re-
 " version, nor without reserving the accustomed yearly rent at
 " the least, nor without charging the lessee with the reparations,
 " nor for longer term than for forty years at the most; nor any
 " houses shall be permitted to be aliened, unless in recompence
 " thereof there shall be, afore, with or presently after such alien-
 " ation, a good and sufficient assurance made in fee-simple ab-
 " solutely to such colleges, houses, bodies politick or corporate,
 " and their successors, of lands of as good value, and of as great
 " yearly value at the least, as so shall be aliened; any statute to
 " the contrary notwithstanding."

Comp. In-
 sumb. 423.

Note; This statute makes no alteration of the statute 1 *Eliz.*
c. 19. nor has any relation to it, but only to the statute 13 *Eliz.*
c. 10. and therefore gives no power to bishops to let houses,
 otherwise than according to 1 *Eliz.* *c.* 19.

Cro. *Eliz.*
 564.

Note also; That this statute need not be found by verdict, being
 a general law.

By this statute it is expressly provided, that no lease shall
 be made of such houses in reversion; but by 13 *Eliz.* *c.* 10.
 no restraint being made of such leases, it was found necessary
 to provide against them by another statute, *viz.* the 18 *Eliz.*
c. 11.

18 *Eliz.*
c. 11. con-
 tinued by
 43 *Eliz.*
Note: This
 statute is a
 general law.
 4 Co. 76.
 120. 2 Roll.
 Abr. 465.

Which reciting, that since the making of the 13 *Eliz.* *c.* 10.
 divers ecclesiastical and spiritual persons, and others having spi-
 ritual or ecclesiastical livings, have from time to time made leases
 for term of twenty-one years, or three lives, long before the expira-
 tion of the former years, contrary to the true intent and meaning
 of the said statute; " Be it therefore enacted, That all leases to
 " be made by any of the said ecclesiastical, spiritual, or collegiate
 " persons, or others, of any of the said ecclesiastical, spiritual,
 " or collegiate lands, tenements, or hereditaments, whereof any
 " former lease for years is in being, not to be expired, surren-
 " dered, or ended within three years next after the making of
 " any such new lease, shall be void, frustrate, and of none effect,
 " and that all and every bond and covenant for renewing or mak-
 " ing of any lease, or leases, contrary to the true intent of this
 " act, or of the said act made in the said 13th year, shall be ut-
 " terly void; any law, statute, &c. Provided that this act, nor
 " any thing therein contained, shall extend or be prejudicial to
 " make frustrate or void any lease or leases heretofore made by
 " any of the said spiritual or ecclesiastical persons, or any of
 " them; but that the same, and every of them, are of the like
 " force and effect as they, or any of them, were before the
 " making of this present statute."

The

The statute of 18 *Eliz. c. 11.* has relation only to the statute of 13 *Eliz. c. 10.* to restrain leases in reversion where above three years of the first lease is then to come, but leaves the statute of 14 *Eliz. c. 11.* perfectly at large as to houses in cities, without making void such leases, or any bonds or covenants concerning them; for as to such houses the statute of 14 *Eliz. c. 11.* is a new law, and sets loose the 13 *Eliz. c. 10.* therefore, where an action of covenant was brought against the Dean of *Lincoln* and one of the prebendaries, upon a covenant made by the Dean and Chapter, by their special names jointly and severally, to make a lease of a house in *London*, though it was argued to be void upon the statute 18 *Eliz. c. 11.* that statute extending only to 13 *Eliz. c. 10.* and not to the 14 *Eliz. c. 11.* which, as to houses in cities, repealed 13 *Eliz. c. 10.* and makes all leases thereof good, so they do not exceed forty years, &c. and are not made in reversion, which was not prohibited by 13 *Eliz. c. 10.* Also, the statute 14 *Eliz. c. 11.* forbids alienations of such houses, except there be full recompence given to the Church at the same time, so as with such recompence they may alien such houses in fee, which was not permitted by 13 *Eliz. c. 10.* and it was adjudged accordingly. And it is (a) (a) 1 Vent. 245. said, the reason of repealing 13 *Eliz. c. 10.* as to houses in market towns, was to make those places more populous.

But to avoid the force of those statutes of 13 *Eliz. c. 10.* and 18 *Eliz. c. 11.* and the clause making void bonds and covenants against them, a contrivance was set on foot to this effect: the Dean and Chapter of *Windſor*, in the 35th year of *Eliz.* made an agreement among themselves by lots to have an assurance of a lease to each of them, of certain part of the possessions of their Church; and after the lots cast, whereby every one knew his own lease, they executed the assurance in this manner: the corporation enters into an obligation of 500 *l.* to every canon that was to have a lease, and the payment limited to be within a short time before the expiration of the old lease in being, and the canon the same day entered into an obligation to pay the College 510 *l.* at the same time, if they did make a lease according to a schedule annexed, which schedule was *verbatim* the demise agreed to be made; and it was farther proved, that the intent and agreement betwixt them was, that one 500 *l.* should be stopped for the other 500 *l.* and that the corporation should have only the 10 *l.* for the lease; which matter being disclosed in Chancery, the Lord Keeper *Egerton* made a decree, that the obligation of 500 *l.* made by the Dean and Canons to each canon was void by 18 *Eliz. c. 11.* and in the same case a precedent was shewn between *Fry* and the Dean and Canons of *Wells*, decreed 44 *Eliz.* in Chancery, which was thus: *Fry* gave to the Dean and Canons of *Wells* 1000 *l.* and took an obligation of 2000 *l.*, with condition to repay the 1000 *l.*, and for non-payment brought an action of debt against the Dean and Prebendaries, and obtained a judgment, and made a defeasance thereof, that if they make a lease to him of land then in lease to Sir *Amias Parvett* for fifteen years to come, then the judgment should be void; and the truth of the case was, that the 1000 *l.* was paid, and 600 *l.* thereof

Hob. 269.
Crane and
Taylor.

Moor, 789.
Dean and
Canons of
Windſor v.
Sir Gilbert
Perwin.

thereof employed in payment of tenths due by the Church; yet by the opinion of *Popham, Anderson, and Periam*, it was decreed in Chancery, that the judgment was void by 18 *Eliz. c. 11.* which makes void bonds and covenants for making leases against that statute of 13 *Eliz. c. 10.* but by way of arbitrament they awarded to *Fry* the 600 *l.* that was paid and employed in the affairs of the Church, and after the 43 *Eliz. c. 9. § 8.* was made to extend to judgments in such cases.

Another statute concerning leases made by colleges in the two Universities; and the colleges of *Winchester* and *Eaton*, is 18 *Eliz. c. 6.* which adds one thing more, as followeth: "That no master, provost, president, warden, dean, governor, rector, or chief ruler of any college, cathedral church, hall, or house of learning in any of the universities of *Cambridge* and *Oxford*, nor any provost, warden, or other head officer of the colleges of *Winchester* or *Eaton*, nor the corporation of any of the same, by what title, stile, or name soever they now be, shall or may be called, after the end of this present session of Parliament, shall make any lease for life, lives, or years, of any farm, or any their lands, tenements, or other hereditaments, to the which any tythes, arable land, meadow, or pasture doth or shall appertain, except that the one-third part at least of the old rent be reserved in corn for the said colleges, cathedral churches, halls, and houses, that is to say, in good wheat after the rate of 6 *s.* and 8 *s.* the quarter, or under, and good malt at 5 *s.* the quarter, or under, to be delivered yearly upon a day prefixed at the said colleges, cathedral church, halls, or houses; and for default thereof to pay the said colleges, cathedral church, halls, or houses, in ready money, at the election of the said lessees, their executors, administrators, and assigns, after the rate of the best wheat and malt in the market of *Cambridge*, for the rents that are to be paid to the use of the house or houses there, (and so for *Oxford* and *Winchester*, in totidem verbis,) and in the market of *Windſor* for the rents that are to be paid to the use of the house or houses at *Eaton*, is or shall be sold the next market day before the said rent shall be due, without fraud or deceit; and that all leases otherwise hereafter to be made, and all collateral bonds or assurances to the contrary by any of the said corporations, shall be void in law to all intents and purposes; the same wheat, malt, or money coming of the same, to be expended to the use of the relief of the commons and diet of the said colleges, cathedral church, halls, and houses only, and by no fraud or colour let or sold away from the profit of the said colleges, cathedral church, halls, and houses, and the fellows and scholars in the same, and the use aforesaid; upon pain of deprivation of the governor and chief rulers of the said colleges, cathedral church, halls, and houses, and all other thereunto consenting: but this act, or any thing therein contained, shall not extend or be in any wise prejudicial to any lease to be made of a barn called *Muncken Barn*, with a certain portion of tithes rising, growing, and being in the parish of *Southweck* in the county of *Suffex*,
being

“ being parcel of the possessions of *Maudlin College* in *Oxford*, so
 “ that the term demised in and by the said lease exceed not the
 “ number of ten years from and after the feast of *St. Michael the*
 “ *Archangel* next coming, neither shall this act extend to any lease
 “ to be made by the president and scholars of the college of *St.*
 “ *John Baptist* in *Oxford*, to any heir male of *Sir Thomas White*,
 “ founder of the said college, which lease shall be made accord-
 “ ing to the meaning of the foundation and statutes of the said
 “ college, of the manor of *Eisfield*, and no other hereditaments.”

In the construction of this statute it hath been holden, that it is a private act, because it concerns only those particular places; and therefore must be pleaded or given in evidence, or found by a jury, otherwise the court is not bound to take notice of it.

Also it is said, that in a declaration upon a lease made by any of these colleges it ought to be shewed, that the corn was reserved according to the statute; otherwise this may be good cause to move in arrest of judgment; but of this it may be doubted; for in the case itself, cited in *Leon* (a) for that purpose, it appears that that exception was disallowed; for though it does not appear in the declaration that corn was reserved, yet it may be that it was reserved in the lease; and if not, yet the other party ought to shew it; and therefore the exception to the declaration for not shewing it was disallowed.

Leon. 333., the objection is stated to be as in the text; but that reference is faulty in another respect, inasmuch as it states the judgment to have been arrested for this reason.]

Leon. 306.
Sav. 129.

Leon. 306.
 333.
Sav. 129.
 [(a) In the
 case itself,
Leon. 306.,
 the objec-
 tion was,
 that this was
 not found by
 the special
 verdict: in
 the reference
 to the case,

By the statute 22 *Car. 2. c. 11. § 61.* it is enacted, “ That for
 “ ever hereafter the mayor, commonalty, and citizens of *London*
 “ may and shall have a market, to be kept three or four days in
 “ the week, as to them shall seem convenient, upon the ground
 “ now set out by the assent of the dean and chapter of the ca-
 “ thedral church of *St. Paul, London*, for a market-place within
 “ *Newgate*, and that the said dean and chapter shall make and
 “ give one or more lease or leases of the said ground to the said
 “ mayor, commonalty, and citizens, and also of the wall of the
 “ said church-yard, abutting severally upon *Paternoster-row* and
 “ the *Old Change*, for the term of forty years, reserving the year-
 “ ly rent of four pounds for the ground of the said market-place,
 “ and two-pence for every superficial foot of the ground or soil of
 “ the said wall, as it is now set out by the surveyors of the city
 “ and of the said dean and chapter, and so from forty years to
 “ forty years for ever, at the like yearly rent, and one year’s rent,
 “ after the rates aforesaid, to be paid by way of fine for each of
 “ the said grounds respectively, upon the making every new lease
 “ thereof; which said lease and leases shall be good and effectual
 “ in the law, as against the dean and chapter, and their successors,
 “ and all persons claiming by, from, or under them, and that no
 “ house, shed, or other building, shall stand, or hereafter be erect-
 “ ed and fixed upon the said market-place, other than the market-
 “ house already built with the consent of the said dean and chap-
 “ ter; any thing in this or any other act to the contrary not-
 “ withstand-

§ 75.

“withstanding.” “And whereas the said parsons or vicars, or some of them, (within the said city of *London*,) are interested in several glebe lands or grounds, the which they cannot rebuild themselves, nor let such lease or leases as may be an encouragement to others to rebuild the same; be it enacted, That the said parsons and vicars, and every of them respectively, be empowered, and are hereby empowered to let such lease or leases of their said glebe lands or grounds, with the consent and approbation of the patron or patrons, and ordinary, for any term not exceeding forty years, and at such yearly rents, without fine, as can be obtained for the same.”

Dyer, 69. a.
Hob. 7.
Roll. Rep.
443.

Before we mention any cases, or make any observations on the foregoing statute, it may be necessary to take notice, that at common law if a parson had made a lease for years of his glebe-land, to begin after his death, or granted a rent-charge in that manner, and such lease or grant were confirmed by the patron and ordinary, this would have bound the successor of the parson; because here was the consent and concurrence of all persons interested, and the lease or charge bound immediately from the perfecting of the deed by the parson, patron, and ordinary, though it was not to take effect in possession till after the parson's death; but now no confirmation whatever will make such lease or grant good against the successor, by reason of the statutes made to avoid them.

Hetl. 57.
Mayor and
Common-
alty of
Winches-
ter's case.

If a parson obtain a grant to build houses on church or college lands, and this be confirmed, (in case where confirmation is necessary,) yet this grant is no alienation against the statutes, but is only a covenant or licence, and nothing else; for the soil remains in the grantor, and, by consequence, the houses built thereon are in him.

Comp. In-
cumb. 334.

If a parish be upon the design of inclosing lands, and a parson have tithes in kind, and common for beasts thereout, the Chancery may decree him to take a quantity of ground elsewhere, in lieu thereof.

Comp. In-
cumb. 334.

So, where one had a lease of tithes in kind, it was ordered in Chancery, that a commission should go forth to set out other meadow and ground in lieu thereof; the reason of which cases seems to be, either for the prejudice the publick might suffer, if such recompence in no case should be allowed, or for that the successor of the parson hath no injury thereby, being recompenced in other lands: *sed quare*, why an act of parliament in such cases ought not to be procured? for it should seem the Chancery, as well as the other courts, are bound by all acts of parliament, which are positive laws, and have no liberty of breaking through them, upon any pretence of convenience or necessity, more than other courts.

Hob. 263.
Noy, 5.

By the statute of 14 *Eliz. c. 11.* as appears before, all those who were restrained by 13 *Eliz. c. 10.* have liberty given them to alien houses in cities absolutely, so as at the time of such alienation there be a recompence in lands given to them, and their successors, of as great value as the houses aliened are; but this liberty of aliening, upon such recompence to be given, extends only to houses; for as to lands they have no such power, nor can they exchange

exchange them, to bind their successors, upon any recompence whatsoever: and *quare*, whether such house may be exchanged for lands of greater value, without licence, against the statutes of *mortmain*?

It is agreed, that corporations of mayor and commonalty, bailiffs and burghesses, and such other lay corporations, are out of all the beforementioned statutes, and may make leases, and other estates, as they might ever have done.

It hath been adjudged, that a spiritual person not beneficed is not within the 21 H. 8. c. 13. which prohibits spiritual persons from taking leases to farm, &c. for life, years, or at will, in their own name, or in the name of any other person or persons to their use, &c.

Sid. 162.
Deg. 135:
Mich.
4 Car. 1.
in Scaccar.,
Clagg and
Lampley.

A lease being made to a spiritual person against 21 H. 8. c. 13. and a bond or obligation taken for performance of covenants, the obligee brought an action of debt upon this bond, and had judgment; which proves that the lease was not absolutely void between the lessor and lessee, as the words of the statute are; and though in *Dyer*, where this case is reported, this is not mentioned to be any cause of the judgment; yet *Periam* in 1 Leon. held it to be the greatest cause of the judgment: and so it appears to have been adjudged in another place; for the statute inflicts a penalty of 10 l. for every month that the clerk shall occupy such farm, and therefore it cannot be void; but the leases made void by that statute are only those which spiritual persons before that act, or after had, and before *Mickaelmas* then next following were not bargained, sold, or granted away.

Dyer, 27,
28. 358. a.
Leon. 309.
3 Keb. 436.

In an action upon 21 H. 8. c. 13. against a parson for taking farms, it is a good plea to say, *non habuit seu tenuit ad firman contra formam statuti*; and the defendant may give in evidence, that the farm was for the maintenance of his house, &c. according to the proviso in the statute for that purpose*.

Bro. tit.
Action sur le
stat. 2.
* Would not
the general
issue nil de-
bet, be as

good, if not more eligible?

Also, the writ grounded on this statute ought to be *qui tam* for the king and party; and therefore a writ, which demanded the whole, was ruled not to be good. But the statute need not be mentioned in the writ.

Bro. Action
sur le stat.
4.

By another act, intituled, *An act for the erecting of hospitals, or abiding and working-houses for the poor*, it is (amongst other things) provided, That all leases, grants, conveyances, or estates to be made by any corporation so to be founded exceeding the number of twenty-one years, and that in possession, and whereupon the accustomed yearly rent, or more, by the greater part of twenty years next before the taking of such lease, shall not be reserved, and yearly payable, shall be void.

39 Eliz.
c. 5. § 2.

As to the persons who may be said to be seised in right of their churches, so as to be empowered by the statute of 32 H. 8. c. 28. to make leases for three lives, or twenty-one years, to bind their successors, it appears to have been adjudged, that a prebendary, though he be seised in right of his prebend, and not in right of his church, may

4 Leon. 51.
Action and
Pritcher.
Cro. Eliz.
350. Wat-
kinson and
Munn, Co.

Lit. 44. b.
3 Bull. 290.
Bro. tit.
Leases, 9.
Palm. 105.
Comp. Incumb. 325.

yet within the equity of that act make leases for three lives, or twenty-one years, to bind his successor, observing the several qualifications required by the act; for the words of the act being general, all persons having an estate of inheritance in right of their church, with a special exception of parsons and vicars only, shew the intent of the act to include and take in all but those so excepted: and *Popham* said, that in *Dr. Dale's* case, for an house near *St. Paul's* it was so adjudged, and so had been twice adjudged in his experience; and *Fenner* said, it was so adjudged in the case of a treasurer of a church. Besides, prebendaries are ecclesiastical persons, for they are admitted and instituted, and have *locum in choro, & vocem in capitulo*.

Lev. 112.
Sid. 158.
Keb. 576.
Bis v. Holt,
Palm. 105.
Eusden v.
Dennis.

So likewise, it hath been adjudged, that a chancellor of a cathedral church may make leases for twenty-one years, or three lives, within this statute, to bind his successor: so, of a treasurer, archdeacon, and precentor; for they are prebendaries, and more, for they are generally chosen out of the prebendaries, and have those dignities superadded or annexed. And though chancellors and treasurers are in some sort ministerial, yet are they not *inter minores ordines*, as the *ostiarii* and *vergers* are, who are only servants to carry candles and wax, keep the doors, &c., but the others are seised in fee in right of their church, &c., and have moreover these dignities superadded. But a case was cited to have been adjudged in the Exchequer, that leases made by the chanters of *St. Paul's* must be confirmed; for it was said, they are not properly chanters, but singing men only, and *minoris ordinis*; but the chanters, properly so called, precentors, &c. are *majoris ordinis*; as the bishop of *Sarum*, in right of his bishoprick, is *precentor Anglie*; which shews it to be honorary, and a spiritual dignity.

Bro. tit.
A. 64. 80.

If a parson, prebendary, mayor, dean, abbot, &c., or any other sole corporation make a lease for years, either upon these statutes, or at common law, though the lessor be under the age of twenty-one years, yet he shall not avoid such lease for that cause; for since they are admitted to exercise such offices or functions, though within age, they are likewise by law supposed capable of doing all things belonging thereto, as other persons of full age may do; and therefore such acts as are done by them in their politick capacity, which is subject to no age or infirmity, as the body natural is, are valid and effectual, notwithstanding their minority, which in such case is not material.

2. Of the Rules to be observed, and Qualifications requisite to the Perfection of Leases by Ecclesiastical Persons: And therein,

Rule 1. Where an Indenture or Deed is necessary.

Co. Lit.
44. b.
3 Keb. 379.

The first thing to be observed upon the several statutes before-mentioned concerning leases is, that as well upon the statutes of the 1 Eliz. c. 19. & 13 Eliz. c. 10. as upon 32 H. 8. c. 28. the leases to be made by virtue thereof must be by indenture; for though the statutes 1 Eliz. c. 19. & 13 Eliz. c. 10. do not require

quire it, yet in that and all other qualities and properties required by the 32 H. 8. c. 28. (except concurrent leases only), they must follow the pattern thereof. And (a) if the deed be indented, whether it begin *this indenture* or not, it is not material; for notwithstanding that, it is an indenture: on the contrary, if it be not indented, the calling it an indenture will not make it so*.

22.—* If only the form of indenting the parchment, or paper, be wanting, that is not material, for it might even by done in court, and therefore no exception is now taken on such a trifling omission.

But the most observable thing under this head is, how far a parol lease or agreement by the parson with his parishioner or a stranger for his tithes shall be good, and how far and in what cases not: concerning which there are various cases and opinions in the books, many of which have no foundation from the statute, but stand entirely on their own bottom.

And herein all the books agree, that if a parson lease or grant over his tithes to a stranger for life or years, or even for a year, that such lease or grant must be in writing; and if it be not, it will be absolutely void; the reason whereof is, because tithes are things which lie merely in grant, and whereof no manual occupation can be; till they are actually collected, they are not things substantive, whereof the property can be changed by the notoriety of livery and seisin, or any actual taking of possession; but their whole essence before they are severed and divided consists only in notion and idea: therefore, without deed, the grantee or lessee can make no manner of title to them; for without that, there is nothing can be done to invest him with the property thereof, but the essence and substance of his title is to be derived from the deed, granting or leasing them to him: and for this reason it is that he must not only have a deed thereof, but must also in pleading shew it with a *profert hic in curia*; for otherwise the court, which is to judge *secundum allegata & probata*, can no more adjudge his title good, than if he had no deed at all: but yet (b) if such grant or lease be made of tithes without deed, and the grantee or lessee sue for them in the spiritual court, the defendant must plead that all the title the plaintiff has is by lease without deed; nor can he suggest this matter to ground a prohibition on; but he ought either to set out his tithes without regarding who hath the title to them, which will discharge him, or he ought to prescribe *in modo decimandi*, and surmise that the tithes belong to J. S. with whom he hath compounded to pay such a sum for all tithes.

But if a parson lease his rectory or parsonage for years, in this case the tithes and offerings will pass as incident to the rectory, though there be no deed, because the rectory is the principal, and the lease of that being good without deed, the tithes and offerings, which are but as part of or accessory to the rectory, must pass likewise, though they are not named. And some hold, that by such parol lease, the rectory and tithes will pass, though there be no house, but only the church and church-yard.

If a portion of tithes hath been long used with a chapel, a grant or lease of the chapel, with all the tithes thereunto belonging,

(a) 5 Co. 25.
Stile's case.
Co. Lit. 143.
a. 229. a.
Cro. Eliz.
472.

2 Inst. 672.
2 Roll. Abr.

Comp. Incumb. 337.
&c.

Godb. 374.
2 Roll.
Abr. 63.
Cro. Eliz.
188. 249.
Perk. § 62.
Cro. Jac.
317. 613.
10 Co. 92.
Leon. 23.
2 Brownl.
11. 17.
2 Keb. 17.

(b) Leon.
23. Whitby
v. Sanders.

2 Roll.
Abr. 63.
Litch. 177.
Bro. tit. Incidents, 7.
tit. Leases,
15. 20.
tit. Grant,
44. 59.

Clayton,
§ 25. Brad-
ford's case.

Comp. Incumb. 338.

is a sufficient description to pass the tithes, though generally a portion of tithes ought to be so named. But it does not appear whether in this case the grant or lease of the chapel were by deed or not.

As concerning leases of tithes to the parishioner himself, who ought to pay them, there are variety of opinions in the books, how far such leases or agreements shall be good without writing, if they are made for the life of the parson, or for years, or for one year only, and how far, and in what cases, the assignee of the parishioner shall take advantage of, or be bound by such leases or agreements.

Cro. Jac.

137.

Cro. Eliz.

188. 249.

Noy, 121.

Yelv. 94.

2 Leon. 29.

3 Leon. 357.

Godb. 333.

Palm. 377.

2 Brownl.

117.

Lev. 24.

2 Roll.

Abr. 63.

Godb. 333.

Palm. 377.

Hetley, 31.

107. 122.

Yelv. 94.

Noy, 121.

3 Leon. 257.

2 Brownl.

11. 2 Roll.

Abr. 63.

Godb. 354.

374. Cro.

Jac. 668.

First then, most of the books agree, that if the parson, in consideration of such a sum then paid, or so much annually to be paid, by the parishioner, contract or agree by parol with him, that he shall retain his tithes, or shall be discharged of the payment of his tithes during the life of the parson, or for so many years as he shall be incumbent, this shall be void. And the reason given is, because as a lease, this cannot be good without writing; and as a composition or agreement, it cannot be good, because it is uncertain at the making of it.

But yet some books hold such parol agreement for the life or incumbency of the parson to be good, and that if he demands tithes against it in the spiritual court, a prohibition shall be awarded to stay his suit.

It is held in several books, that though such parol agreement with the parishioner for the life or incumbency of the parson be not good, yet if it be for so many years certain, that this is good, though it be not by deed or writing; because it is in nature of a composition or agreement with the parishioner himself, who ought to pay them; and therefore if he sues in the spiritual court for tithes, against such agreement, a prohibition shall be awarded to stay his proceeding.

Hetley, 31.

So it is likewise held, in pursuance of that opinion, that if the parishioner, after such agreement to retain his tithes for years, makes a lease of those lands to another, that the lessee also shall be discharged of the payment of tithes, because the discharge runs along with the land. But others hold the contrary; and that if the assignee be sued in the spiritual court he shall have no prohibition, because by such parol contract no interest was transferred to the parishioner, but it was only a personal agreement between the parties themselves, and cannot extend to strangers.

Yelv. 94.

Hawkes and

Brothwith.

2 Roll.

Abr. 63.

Cro. Jac.

668.

Godb. 333.

Palm. 377.

But all that hold such parol agreement for years to be good, hold likewise, that, if the agreement were with the parishioner, his executors and assigns, there the executors or assigns of the parishioner, or even their lessee at will, shall take advantage thereof; and if they are sued in the spiritual court, shall have a prohibition, and compel the parson to take his remedy upon the contract; and that if the executors of the parishioner have made a lease over at will, they shall have their remedy over against the tenant at will, who

who came in under the benefit of such a discharge, and therefore ought to be contributory to the charge of it : and that granting such prohibition is a means to compel the parson to seek his true remedy.

And yet we find some cases where such agreement was by deed with the parishioner and his assigns, that the parishioner, or assignee, being sued in the spiritual court, could have no prohibition, because, it was said, the covenant or agreement passed no interest in the tithes ; and therefore, for breach of such covenant, the assignee had no remedy, but by action of covenant on the deed.

Accordingly also several books held, that though such parol agreement for life or years, be not sufficient foundation for granting a prohibition, yet such suit in the spiritual court is a breach of the contract or agreement, for which the party may have remedy by action upon the case, upon the *assumpsit*, that he should hold discharged.

So likewise it is held, in several books, that though such parol agreement to retain for life or years be not good by way of passing an interest, yet if an action of debt be brought upon the statute 2 & 3 E. 6. c. 13. and the agreement be pleaded, and found for the defendant, that this shall be sufficient to bar the plaintiff of the treble damages given by that statute : so if *nihil debet* be pleaded, and such agreement be given in evidence, it is sufficient to excuse the defendant from the penalty of treble damages.

But the best opinion seems to be, that such parol agreement with the parishioner himself for more than one year is void : and even to make good this, it ought not to be entered into till after the corn is sown, because when once the corn is sown, then it is supposed to be *in esse*, and growing all that year ; and then such agreement is in the nature of a sale of a thing or chattel actually *in esse*, which, like sales of other goods and chattels, needs no writing. But if it be for more than one year, then it is in nature of a lease or grant of the parson's right or interest in the tithes, which, before they are *in esse*, consist only in notion ; and therefore, to bind the parson, there ought to be a deed or writing ; and if there be not, he may sue for them in the spiritual court, and shall not be tied up by a prohibition ; and such parol grant or agreement, for more years than one, is not only void for all the years after the first, but in the whole ; for the contract being entire, must be void in all, or good in all, and shall not be good and void by parcels.

But a diversity seems to be taken in some books, between the parson or vicar, and the impropriator ; the parson or vicar, they say, may lease his tithes for one year without deed, but the impropriator cannot, but it will be absolutely void ; and it is said to be so ruled in *Bennet* and *Spel's* case ; and in the case of *Bellamy* and *Balthorp*, where the lease for one year by the impropriator was holden void, being to a stranger of the tithes of the whole parish, by the opposition (a) that follows in saying, "*otherwise it is, if it be a lease of the tithes for a year, by the parson himself*," it must also be meant of a lease to a stranger, and not to the parishioner himself, who ought to pay them ; and then it follows, that a parson or vicar may lease the tithes of their whole parish for one year to a stranger, without deed, which, it seems, they may do, notwith-

Palm. 36.
Aldriche's
case.

Palm. 377.
2 Leon. 73.
Wellock's
case.

2 Leon. 29.
Poph. 140.
Fulcher v.
Griffin.
Godb. 333.
Palm. 377.
Roll. Abr.

43. Brown v. Kinman.

Lev. 24.
Raym. 14.
Keb. 5. 21.
2 Keb. 34.
3 Keb. 24.

2 Brownl.
17. Cro.
Jac. 137.
Hob. 176.
Cro. Eliz.
188. 247.
2 Leon. 29.
3 Leon. 257.
Owen, 103.
Lev. 24.
Raym. 14.
Keb. 5.
Godb. 333a
334.
Latch. 176.
Noy, 89.
Comp. In-
cumb. 340.

Comp. In-
cumb. 338.
Latch 176.
Noy, 89.
Godb. 374.
[(a) The
argument
from this
opposition is
drawn en-
tirely from
Noy's re-
port : In
Godbolt,
the right of
the parson to
demise his

tithes without deed is expressly negatived by Dodderidge, J.; and in Latch, no more is said, than that "the parson may discharge the parishoner of tithes by parol, or lease the rectory, consisting of glebe and tithes, by parol for years."—

Although in the discussion of this question in the cases in the text, a parol demise be generally used in opposition to one by deed, yet the question is not,

whether tithes may be leased by parol merely, but whether they may be leased without deed? And the result of all the cases seems to be, that to pass an interest in tithes, to convey them to a stranger, a deed is absolutely necessary: but that a composition with the parishoner by way of retainer is good without deed. This latter point receives a confirmation, if indeed it want any, from the Kensington case (*Adams v. Hewitt*, Dom. Proc. 1782.); for in that case the composition was without deed; but when the lords held that the notice there given to determine the composition was not a sufficient notice for that purpose, they necessarily admitted the composition itself to be valid, for there could be no question about the determination of a thing that was void.—In *Keddington v. Bridgman*, Bunb. 2. a difference is taken between a composition by way of retainer by parol, and an agreement between the parson and his parishioners by parol; the latter, Baron Montague thought would be good for years, being only an agreement that the parson would not sue his parishioners for so many years for tithes; the former, *Bury and Price*, Barons, held was good only for one year, being by way of contract. But where is the difference between the composition and the agreement in this case? The agreement on the part of the parson, is, that he will not demand tithes in kind for a limited time; on the part of the parishioners, that they will, during that time, pay a sum of money in lieu thereof: but what else is this but a composition? But if a composition be good for one year, it may also be good for more than one year; for the objection is, that tithes, being an incorporeal hereditament, cannot pass without deed; if then they can be retained at all without deed, the more or less time for which they are agreed to be so retained cannot be material. See *Noy*, 121. *Yelv* 96.]

Latch. 115.
Vicar of
Anford's
case.
Palm. 423.
S. C. by the
name of
Harris and
Dilworthy.

A parson by parol, leased his tithe hay to the vicar, and the vicar paid the rent for the first year, but finding that the rent was more than the tithe was worth, refused to hold the bargain any longer; and being sued in the Court of Requests, (which was a court of equity,) and not pleading there any notice of his refusal, and sentence and decree being given for the parson, the vicar prayed a prohibition: it was agreed by the court, that if the vicar had received the profits, he was sueable in the Court of Requests for the rent; and that if he had given notice of the refusal of the bargain, he had been discharged of the rent from the time of the notice given, because he had no remedy for the tithes, for that it is a void contract in law: and by *Dodderidge* and *Jones* the case is the same, though he hath not given notice.

By all the cases before-mentioned, it appears how unsettled a point this is; and it is said now to be the constant practice of the courts at *Westminster* not to grant prohibitions upon the suggestions of such agreements, but to leave it to the spiritual court to determine; and if the party thinks himself there aggrieved, he may appeal. And this seems to hold still, as to such parol leases under the term of three years; for if they be above three years, then by the statute of frauds and perjuries, they are made to have the force only of leases at will; and if under three years, yet by that statute there must be yearly reserved two-thirds, at least, of the full improved value of the thing demised.

Comp. In-
cumb. 339.
349.

Rule 2. When such Leases are to begin.

And herein the statute of 32 H. c. 28. is different from the statutes of 1 Eliz. c. 19. & 13 Eliz. c. 10. for the 32 H. 8. c. 28. requires such leases to begin from the day of the making; but by the exceptions in 1 & 13 Eliz. they are to begin from the making thereof; and the diversity between these expressions will appear more fully by the following cases, which we will reduce under the following heads:

Co. Lit.
45. a.
5 Co. 6.
Mounjoy's
case.
3 Keb. 379.

1. When such Leases as have no Date at all, or a void or impossible Date, are to begin.

As to such leases as have no date at all, or a void or impossible date, as the 30th day of *February*, or the 40th of *March*, these must begin from the delivery, for there is no other certain *indictum* of the time of their taking effect; and therefore the delivery, which is solemn and notorious, gives them from thenceforth a sanction, and binds the parties thereto.

Plow. 402. Roll. Abr. 848. Latch. 61.

2. Such Leases as have a good Date, and are delivered on the same Day: in what Cases the Day of the Date or Delivery is to be taken inclusive, and in what Cases exclusive.

Where leases have a good date, and are delivered on the same day, *habendum* for twenty-one years, without saying for what time or when they shall begin; the leases in this case shall begin from the delivery; for the delivery makes the deed presently to be the deed of the lessor, and when nothing appears to the contrary, the lands contained in such deed shall pass to the lessee at the same time: for otherwise it would be the deed of the lessor to no manner of purpose; and there can be no reason to affix the time when the lands shall pass after one day more than another; therefore the delivery, which in this case makes it the deed of the lessor, shall likewise fix the *terminus a quo* the contract or lease shall begin.

Co. Lit. 46.
Comb. In-
cumb. 3; O.
Roll. Abr.
849.

So, if a lease be made for twenty-one years *habendum* from the making, or from the sealing and delivery, or from henceforth, this shall take effect from the delivery, whether there be a date or not; for the delivery gives sanction to the deed, and before de-

Hob. 140.
5 Co. 1.
2 Co. 5. a.
2 Inst. 674.
Moor, 879.
Cro. Jac.

264. Cro.
Car. 263.
Dyer, 286.
307.
Hob. 73.
2 Roll. Abr.
520.

livery it is no deed at all; and, by consequence, from henceforth, or from the making, must relate to the time of its taking effect as a deed, and not from any other time. And in such case, the day of the delivery is taken inclusive; so that if such a lease be delivered the 20th day of *June*, the lease shall determine on the 19th day of *June* inclusive; and though the lease was delivered at four of the clock in the afternoon, or at any time after, on the said 20th day of *June*, yet that whole day shall be taken inclusive, to prevent clamour and incertainty, by making fractions and divisions in a day. And yet in (a) *Latch.* where one declared of a lease of 25 *March*, *habendum abinde* for a year, rendering rent at *Michaelmas* and the *Annunciation*; and it was objected that the last *Annunciation* was not within the year: but the objection was disallowed; for *abinde* shall be taken a *confectione*, and exclusive of the day.

(a) *Latch.*
157. Al-
top's case.

5 Co. 1. 94.
Co. Lit. 46.
Moor, 879.
Cro. Jac.
248. 340.
Cro. Eliz.
766.

But if a lease be made to begin *a die confectionis*, or *a die datis*, there the day of the delivery, or the day of the date, is to be taken exclusive, because the preposition *a* is privative of the whole day before which it is prefixed: and therefore, if the lessee in such case should declare of an ejectment the day of the delivery or date, it would be against him, because that was before his title began.

Denn v.
Fearnside,
1 Will. 176.
See to the
same effect,
Freeman
v. West,
2 Will. 165.
Doe v.
Watton,
Cowp. 189.

[So, where under a power to make leases for twenty-one years, or three lives, *in possession*, and not in reversion, a lease was made to one for three lives, *habendum* from the day of the date thereof, at the usual rent, &c. which lease had all the formal circumstances required by the power; it was holden, that this lease was not warranted by the power, for the demise being *habendum from the day of the date*, the lease was a freehold to commence *in futuro*, and therefore void.]

Co. Lit.
46. b.
Dyer, 218.
Moor, 41.
5 Co. 1.
2 Inst. 674.
2 Roll. Abr.
520. Roll.
Rep. 137.
3 Bull. 203.

So, if a lease be dated and delivered the same day, and the *habend.* be *a datu*, or from the date hereof, it has been held, that the whole day of the date is to be taken exclusive; and by consequence, that from the date, and from the day of the date, are all one, if there be a date; but if there be none; then the date shall be taken for the day of the delivery, and that whole to be excluded.

Cro. Jac.
135. Osborn
and Rider.
Bull. 177.
S. C.

Yet the contrary to this has been adjudged in one case, where an ejectment was brought on a lease made 1 *January* 3 *Jac.* *habend. a datu indenturæ prædictæ*, and the ejectment was the same day, and after verdict for the plaintiff it was moved in arrest, &c. that this lease being made *habend. a datu indenturæ prædictæ*, was as much as from the day of the date, as in 5 *Co. 1.* and then the ejectment being alleged the same day, is ill; but all the court resolved, that the date is the time of the delivery, and it differs from the time or day of the date, and therefore the ejectment being alleged *postea* the same day was good enough, and the plaintiff had judgment.

Moor, 107.
And. 65.
Fox and
Collier.

So, where the archbishop of *York* 6 *Novem.* 18 *Eliz.* by indenture, made a lease for twenty-one years *habend. a datu indenturæ*, no exception was taken to it, which proves that *a datu indenturæ*

is the same as from the making, and that the day of the date, or day of the making, is not to be taken exclusive in such case, because then the lease would not be warranted by the exception in 1 *Eliz. c. 19.* which says, other than for three lives, or twenty-one years from the making, which is inclusive of the day of the making.

Ejectment by the successor of a prebendary upon a lease made for life *habend. a datu*; and if this should bind the successor, was thrice argued, and for the plaintiff urged, that it should not; that *a datu* is all one with *a die datús*, and then livery being made the same day that the indenture bears date was void, because it cannot expect. 2. That this was a lease in reversion, not being to begin in point of interest till the day after the making or date, which is not good by 13 *Eliz. c. 10.* for here the day of the date is excluded. But it was answered and resolved, that in propriety of speech *datus*, or dated in *English*, is the very act of the delivery of the deed; for *datus* in *Latin*, being taken participly, is given or delivered in *English*; and *datus* substantively taken in *Latin*, is the date of the delivery in *English*, which signifies all one; and in *Clayton's* case, the six months were taken the most extensively to make good the deed by enrolment, but to make a word of an equivocal sense as this is, (which may be taken either inclusive or exclusive of the day of the delivery or date of it,) to make the lease void is unreasonable, therefore it shall rather be taken in such sense as may make it good, *ut res magis valeat quam pereat*; and therefore it was adjudged good by the three puisne judges, the Chief Justice *Treby* dissenting, though he was at first of the same opinion, and so also was *Powell*, but afterwards changed it for the defendant; which shews the nicety of these distinctions.

[The distinction made in the preceding cases, and in several of those in the next division, hath been levelled by the decision in the Court of King's Bench in *Pugh v. Duke of Leeds*. In that case, a lease under a power to make leases in possession was made to commence "*from the day of the date*," and on a case made for the opinion of the court on the validity of that lease as a lease in possession, it was holden to be good, upon the ground that the particle *from* might, in the strictest propriety of language, be taken either inclusive or exclusive.]

amined, and commented upon in a very able manner by Mr. *Powell* in his Essay on the relating to the Creation and Execution of Powers.

3 Lev. 438.
Hatter and
Ash.
2 Salk. 413.
pl. 1. S. C.
Ld. Raym.
84.

Cowp. 714.
This decision, it should be remarked, hath not been generally assented to in Westminster-hall. The reader will find it explained in Learning re-

3. Such Leases as have a good Date, but are not delivered till a Week or Month, &c. after, when they are to begin, and how the Declaration on such Leases is to be framed.

And it is to be observed, that every deed shall be intended to be delivered on the same day it bears the date, unless the contrary be proved; and it is the best course (as the law intends) to deliver it on the same day that it bears date: therefore, where in an ejectment the plaintiff declared of a lease dated 1 *Novem. habend. a consensione*, or *a die datús, sigillationis & deliberationis indenturæ prædictæ*,

2 Inst. 674.
Cro. Jac.
264.
Cro. Eliz.
773. Cro.
Jac. 646.
Dyer, 167.
b. 221. b.

prædict., and laid the ejectment 2 *Novem.* though it was objected that the declaration was not good, because it did not appear when the lease was sealed and delivered, and it might be delivered long after the date; and the course is to say, that such a day and year *dimisit per indenturam*, bearing date the same day and year; yet it was adjudged, that the declaration was good, because when he declares that he let by indenture of such a date, it shall be intended to be delivered on the same day, unless it be shewn with a *primo deliberatum* at another day; and he, who pleads a deed of such a date, cannot by replication, or other pleading, maintain it to be delivered at another time, for that would be a departure.

Cro. Jac.
264.

But if the truth be that the lease was sealed and delivered at another time than it bears date, then the plaintiff ought to shew it in his declaration; or the defendant, if it be material for him, may shew in his plea the delivery at another time than the date, and traverse, that it was delivered on the day it bears date.

Cro. Jac.
258. Lew-
ellin and
Williams.

Accordingly, an ejectment was brought of a lease made 12 *Decemb. habend. a primo die*, and upon not guilty, the jury found the lease dated 1 *Decemb. habend.* from henceforth; but delivered 12 *December*, which proves that where the date and delivery were at several times, they ought to be distinguished in the declaration: but the question therein was, whether this lease was the same whereof the plaintiff declared, that is, whether being limited to take effect from henceforth, the day of the date should be taken exclusive, so as to warrant the declaring of a lease *a primo die*? for it was objected, that this did not warrant the declaration, because from henceforth, and from the day of the date, are several commencements, the one beginning on the day it is sealed and delivered, the other the day after. But it was resolved *per curiam*, that they are both one, being a computation up to a time past; and when the lease is sealed at a day after the date, whether it be limited to begin from henceforth, or from the day of the date, yet in pleading it shall be alleged to begin from the day on which it is dated. And Serjeant *Moor* took this diversity in another case, that if one leases land in interest, *habend. a datu*, there, the day of the date shall be taken inclusive, the date and delivery being both on the same day; but where it does not begin in interest at the time it is dated, as where the date and delivery are several, and the *habend.* is *a datu*, there, the day of the date shall be taken exclusive, because it is to commence from the date, that is, from the day of the date, for the date in that case can mean nothing else, since it is not delivered till after; and therefore the computation of its commencement being from a day backwards, that whole day shall be excluded. And perhaps this diversity may reconcile the cases of *Clayton*, 5 *Co.* and *Osburn and Rider*, *Cro. Jac.* 135. before put; for in *Osburn's* case the lease was made the same day it was dated, and so began then in interest; but the case cited in *Clayton's* case, to prove the date and the day of the date to be all one, was, from a computation backwards upon the statute of enrolments, which appoints them to be enrolled within six months after the date; and there it was adjudged

adjudged that a deed enrolled upon the last day of the six months, accounting the day of the date exclusive, was yet well enrolled within the statute; but this, as has been observed, was a computation backwards, and that from the date, and from the day of the date, is all one, is only an *unde sequitur* of my Lord Coke's own, from the case of the enrolment; and in his 1 *Inst.* 46. *b.* where he mentions it again, he cites for it *Clayton's case* and *Dyer*, 286. where that case of the enrolment is reported: And though the case of *Bacon and Waller*, 3 *Bulf.* was adjudged according to *Clayton's case*, that the date and day of the date were all one, and the day to be taken exclusive; so that a lease there dated and delivered 26 *May*, *habendum* from the date, did not begin till 27 *May*; and it appears both by (a) *Bulf.* and *Rolls*, that the judgment therein given was founded on the case of *Lewellin and Williams*, where the date and day of the date were held all one; yet, as it appears, the reason of that case was upon a computation from a time past, and that the lease therein did not begin in point of interest upon the day it bore date, and, by consequence, was no warrant for the judgment that was given in *Bacon and Waller's case*; and then that judgment being founded on the authority of the former case, can be of authority no farther than as it agrees with that former case, and then it is of none at all, because, as appears before, it varied materially from it; therefore, the diversity taken by Serjeant *Moor*, which is likewise warranted by the case of (b) *Osburn and Rider*, seems to remain unshaken, and to be the true distinction for settling the books.

(a) 3 *Bulf.*
203.
Roll. Rep.
387. *Bacon*
and *Waller*.

(b) *Cro.*
Jac. 135.

In ejectment the plaintiff declares of a lease 7 *Jan.* by indenture dated 6 *Decemb.* *habend. a die datus indenturæ prædictæ*, and gave in evidence a lease dated 6 *Decemb.* *habend. a tempore consecutionis indenturæ*, and it was held not the same lease whereof the plaintiff declares, because, says the book, *a die datus* excludes the day. But a better reason seems to be, because it does not agree in point of description with the lease whereof he declares; for if the declaration had been of a lease 7 *Jan.* *habend. a 6 die Decembris*, then by the authority of *Lewellin's case* this had been good; yet being upon a computation from a time past, the day of the date must be pleaded exclusively: but when he declares of a lease 7 *Jan.* by indenture dated 6 *Decemb.* *habend. a die datus*, this must be intended a description of the lease as it is comprised in the indenture; and when he afterwards shews an indenture, containing a lease *habend. a tempore consecutionis*, this is a description of another lease, and not of that which was to begin *a die datus*. And this likewise seems to be the reason, that in another case, where the plaintiff, in bar of an avowry, pleads a lease 30 *March* *habend.* from the feast of the Annunciation next before, and upon traverse of the lease *modo & forma*, the jury found a lease to the plaintiff on the 25th day of *March* for one year from thence next ensuing; and though held not to be the same lease the plaintiff pleaded, because this begins on the 25th of *March* inclusive, and the lease pleaded from the 25th of *March* exclusive, yet the plaintiff had judgment, it being found in substance that the plaintiff

Cro. Jac.
647. *Sca-*
vage and
Parker.

Hob. 73.
Moor, pl.
1188.
Pope v.
Skinner.

plaintiff had such a lease as by force thereof he might have common the 11th of *April* following, &c. but agreed clearly, that if he had declared so in ejectment, it would have been against him, because there he demands and recovers the term, and therefore must set out his title truly, which appears to have been by a lease dated and executed the 25th of *March*, *habend.* from thenceforth; and therefore a lease executed but the 30th of *March*, and dated the 25th of *March*, *habend.* from thenceforth, could not be the same, not agreeing in point of description. But if the truth had been that the lease had been executed but the 30th of *March*, then, it seems, he might have declared of a lease then made *habend.* from the 25th day of *March*, being a computation from a time past, though the lease were dated 25th *March*, *habend.* from henceforth, because it did not then begin in interest: But *quære*, if the better way in all these cases, to prevent any mistakes, be not to declare of a lease dated such a day, *habend.* from henceforth, or from the making, or from the day of the date, or day of the making, &c. exactly as it is in the lease *, with a *primo deliberat.* such a day, if the truth be so, rather than for the lessor to take upon him to judge when the day shall be taken inclusive, and when exclusive, and so as in this case to declare of the *habend.* a 25 *die Martii*, when in truth the *habend.* was worded from henceforth; though if the lease had been executed but 30 *March*, it seems that if he had declared of a lease 30 *March* *habend.* a 25 *March*, this had been good, for the reasons before-mentioned.

* This is now the form constantly used by good pleaders.

Cro. Car. 502. Loyd v. Gregory.

A lease in reversion was made to commence *ad festum Annunciationis* after the former lease should be determined; and it was objected, that it ought to be a *festum Annunciationis*; yet the court held it to be all one, for that there shall be no fraction of a day: but *quære*, how this would have made a fraction of a day? for there seems to be a whole day's difference, *ad* including the feast-day, and *a* excluding it.

Yelv. 131. Edmonds v. Boothe.

A parson leases by indenture the tithes of 200 acres of land to the owner of the land, of which he, and his wife, and his heirs were seised, *habend.* from *Mich.* next following to him and his heirs, during the life of the parson: the lessee dies, and his wife had the 200 acres for her jointure, and married *B.*, who let the 200 acres to the plaintiff; the heir of the first husband grants also to the plaintiff the tithes of those lands at will, and he being sued for tithes by the parson against his own lease, brought a prohibition; but a consultation was after granted; for by *Flemming*, *Fenner*, and *Williams*, the lease being for life, and to begin at a day to come, was void; for though tithes are spiritual, and are not extinct in the land, yet in the conveyance of them they ought to follow the nature of land, rent, or other hereditaments *in esse*, which cannot be granted for life at a day to come. But *Yelverton* and *Croke* thought, that this lease being to the owner of the land, did not enure by way of *interest*, but by way of *discharge*; for as the plaintiff hath pleaded, by force of which the lessee was seised of the tithes to him and his heirs for the life of the parson; they, as judges, could not intend it to be otherwise: and besides, it cannot be intended

by way of discharge, because there are no such words in the lease, and it was more for the lessee's benefit to have it by way of interest, than by way of discharge; for then this would be such a privilege annexed to the land as could not be granted over; whereas here the wife was owner of the land, but the son and heir of the lessee took upon him to be owner of the tithes: and *Velverton* inclined, that the pleading of the lease, and of the seisin by force of it, was not good.

A lease of houses within 14 *Eliz. c. 11.* may be made for years from a time to come; for that statute does not require them to begin from the making, or day of the making, but only that they do not exceed forty years from the making.

Prph. 9.
Thompson
v. Trafford.

And it is said, that a lease for lives being avoided at common law, for that it was made to commence from a time to come, an injunction was granted out of Chancery to continue possession.

Comp. In-
cumb. 341.

A lease to three for their lives, *habend. a die datis*, is good, if livery be made after the day of the date, because till livery nothing passes, and being made after the day of the date, it may then operate presently: *secus*, if livery had been made on the day of the date, because then the operation of it must have been suspended till the next day, which the law will not allow.

Moor, 637.
759.

[The dean and chapter of *Worcester* being seised in right of their church of one of the manors of *Charlton*, by indenture bearing date the 26th *November* 1750, for a valuable consideration granted the said manor, of which the premises in question were part, to the lessor of the plaintiff, to hold to him and his heirs from the day of the date thereof for the lives of three persons, under the yearly rents, &c. In the lease, power was given by the dean and chapter to their attorney, to take possession of the premises, and to deliver seisin thereof to the lessee, *according to the tenor, effect, and true meaning of the said lease*; and in pursuance of such power, seisin was delivered of the premises by the attorney to the lessee, on the 28th day of *May* 1751. The question was, whether this lease being made to commence from the day of the date thereof, and seisin delivered the 28th of *May* following, was good? The court held that it was: that till livery was made, the freehold remained in the dean and chapter: that they would presume that the power given to the attorney was to make livery at *any* day subsequent to the lease, which, they said, was the true meaning of the deed; for by the warrant of attorney to deliver seisin in the present case, the deed should be substantiated by the livery.

Freeman
v. West,
2 Will. 165.

But if a man make a lease of land to hold for life from the day of the date, and make livery by attorney the same day *secundum formam chartæ*, this is a void lease.]

Bull v.
Wyatt,
1 Roll.
Abr. 823.

Butler v. Fincher, 2 Bullstr. 302. 1 Roll. Rep. 209.

Rule 3. Within what Time the old Lease is to be surrendered; and herein of concurrent Leases.

Another rule to be observed in the making of leases upon these statutes is, that if there be an old lease in being, it must be surrendered,

Co. Lit.
44. b.
5 Co. 2.

Moore, pl.
1034.
[(a) The
lessor of the
plaintiff,
being a pre-
bendary of

rendered, expired, or ended within a certain time after the making of the new lease; and such surrender must be absolute, and not conditional (a); for then the intent of the statute might be easily evaded, by setting up all such old leases again, upon breach of the condition.

Sarum, brought an ejectment to avoid a lease made by his predecessor, as not being conformable to the above proviso in the stat. 32 H. 8. His objection was, that the surrender made of the former lease was with a condition, that if the then prebendary did not within a week after grant a new lease for three lives, the surrender should be void; whereby, as it was contended for the plaintiff, the old term was not absolutely gone, but the lessee reserved a power of setting it up again. But the court, after two arguments, gave judgment for the defendant; this being within the intent of the statute, which was, that there should not be two long leases standing out against the successor. Here, the new lease was made within the week, and from thence it became an absolute surrender both in deed and law. And the whole was out of the lessee, without further act to be done by him. In the proviso in this act, there is the word *ended* as well as surrendered; and can any one say the first lease is not at an end? This was no more than a reasonable caution in the first lessee, to keep some hold of his old estate, till a new title was made to him. *Wilson ex dem. Eyres v. Carter*, 2 Str. 1201.]

Roll. Rep.
82. Sir
George
Frevil v.
Ewebank.
Comp. In-
cumb. 345.

And such surrender may be safely made either to a corporation sole or aggregate, upon their promise to make a new lease; for if any single person, or sole corporation make such promise, and refuse after to make the lease, an action on the case shall lie against them; and if such promise be made by a corporation aggregate, though no action will lie against them, because being a corporation they cannot be bound without deed, yet the person who surrendered may sue in equity, and compel them to a specific performance of their promise, and to make a new lease: but such suit must be against some of them by name, as the dean in particular, and the chapter of the same place generally: and such suit in equity seems the best way in case the surrender was made to a sole corporation or single person, because in the action at common law, damages are to be recovered only, but no new lease made, as will be decreed in equity. But now since the statute of frauds and perjuries, which requires all surrenders to be in writing, it is usual to have a covenant from the person or corporation, to whom the surrender is made, that they will within such a time make a new lease under such and such terms; but, as it seems, that statute does not extend to surrenders in law, by the taking of a new lease in writing.

29 Car. 2.
c. 3.

The statute of 32 H. 8. c. 28. provides, that such old lease shall be expired, surrendered, or ended within one year next after the making of the new lease; and the statute 18 Eliz. c. 11. enacts, that all leases to be made by any of the ecclesiastical, spiritual, or collegiate persons, or others, within 13 Eliz. c. 10. of any lands, &c. whereof any former lease, &c. for years is in being, and not to be expired, surrendered, or ended within three years next after the making of any such new lease, shall be void, and of none effect.

Foph. 9.
Plow. 106.
Comp. In-
cumb. 345-
6.

And a surrender in law by the taking of a new lease, either to begin presently, or at a day to come, seems a good surrender within these statutes; for by taking such new lease, though it be to commence at a future day, the first lease is presently surrendered and gone, and shall not continue good till the day on which the second lease is to commence; but by acceptance of such second

lease

lease the first is immediately determined; because both leases cannot consist together, and the first cannot be dissolved or surrendered in part, and therefore must be surrendered for the whole.

One *Small* being possessed of the manor of *Paddington* by a lease for years from a bishop, the bishop made a lease to another for three lives, and before livery the tenant surrendered his former term; it was held, that this surrender was made in time, and the second lease good, because it was no complete lease till livery, and before that, the first lease was surrendered and gone.

Degg. 130.
Small's case.

And this rule, that if there be any old lease in being, it must be surrendered, expired, or ended within the times before-mentioned, is necessary not only when bishops, and other sole corporations, mentioned in 32 *H. 8. c. 28.* make leases by authority of that statute for twenty-one years, or three lives, without the assent or confirmation of others, but also when any spiritual or ecclesiastical corporation sole (other than bishops) do make such leases, though with the consent and confirmation of those who by law are to confirm the same, and also when any spiritual, ecclesiastical, or collegiate corporation aggregate make such leases whereto no confirmation of others was ever requisite: for the better understanding whereof, it will be necessary to consider the learning of concurrent leases, and what persons, upon the several statutes before-mentioned are capable of making them, and in what manner.

Comp. Incumb. 343.

To begin then with bishops: it is to be observed, that at common law, bishops, with the confirmation of their dean and chapter, might have aliened the possessions of their church for ever, or have made leases for what term of years they thought fit; and this would have bound their successors, though it were for 5000 years: but a bishop, without such confirmation, could not have made a lease to bind his successors, though but for one year; both of which being great mischiefs, were remedied by 32 *H. 8. c. 28.* and 1 *Eliz. c. 19.* For whereas before 32 *H. 8. c. 28.* bishops could not make any lease at all to bind their successors, unless it were confirmed by the dean and chapter; now that statute enables the bishops alone, without such confirmation, to make leases of all or any of their possessions, so they do not exceed three lives, or twenty-one years; but if bishops had a mind to make leases or grants for any longer term, or in any other manner than this statute warranted, then such leases or grants were out of the protection of this act, and remained perfectly at common law, as they were before, and, by consequence, must have the like confirmation of the dean and chapter, in order to bind the successor, as they must have in all cases at common law: and because it was found by experience, that many bishops made an ill use of this power, and chose to make leases for long terms of years, rather than keep within the bounds this statute had prescribed them, and sometimes to make absolute alienations of their possessions, and then get the dean and chapter to confirm such leases and alienations, whereby the successor was oftentimes left without sufficient to keep up hospitality, or sustain his dignity; therefore, to remedy this mischief was the statute

Moor, 107.
And. 65.
Fox and
Collier.
Leon. 36.
3 Leon. 131.
Palm. 464.
466, 467.
Latch. 241.
Leon. 59.
Co. Lit. 45.
Ley, 73.

statute of 1 *Eliz. c. 19.* made, which makes void all gifts, grants, &c. or estates of any honours, castles, manors, lands, tenements, or hereditaments, being parcel of the possession of the bishoprick, (other than for twenty-one years, or three lives,) so that now, after this statute, no confirmation whatever will make good any Bishop's lease, if it exceed that term, because then the statute makes it void, and, by consequence, not capable of receiving any sanction from a confirmation: but upon these statutes was the concurrent lease invented, which has generally obtained, and been held good, and is in this manner.

Moor, 107.
And. 65.
Leon. 36.
3 Leon. 131.
Palm. 464.,
&c.
Latch. 241.

If a bishop solely makes a lease for twenty-one years according to the statute of 32 *H. 8. c. 28.* and within four or five years, or more, before the end of that lease makes a new lease to another for twenty-one years, to begin from the making, &c. this second lease, if it be confirmed by the dean and chapter, and be in every thing else pursuant to the exception in the 1 *Eliz. c. 19.* is good as a concurrent lease, for these reasons: 1. Because such lease, though it be not good within the 32 *H. 8. c. 28.* by reason the first lease is not surrendered or expired within a year after the making thereof; yet being confirmed by the dean and chapter, it remains a good lease at common law, and then if it be not void within the exception of 1 *Eliz. c. 19.* the successor shall be bound; and that it is not void within that statute, appears both from the letter and meaning of the exception; for the words are, *other than for twenty-one years, or three lives, from such time as any such lease shall begin;* now this second lease does not exceed twenty-one years from the time it begins, being for twenty-one years only from the making, and so within the express words of the exception. 2. This is not void within the meaning of the exception, because for so many years as were to come of the first lease this is good only by estoppel, and not in interest; for the second lessee can have no benefit of it so long as the first lease endures, and then against the successor there is in effect no more than a lease for twenty-one years; for the second lease, being in effect void for all the years that are to come of the first lease, those years that are to come of the first lease and those that will then remain of the second lease make in all no more than twenty-one years at one time, and so not against the meaning of that exception. 3. Such second lease is so far from being prejudicial to the successor, that it is rather for his benefit; for now he will have the rent reserved on the first lease during the residue of that term, and may also at the same time recover the rent reserved upon the second lease, being only for years, because the lessee is estopped to say he did not take such lease under such reservation: and so the successor will have two rents instead of one; though if the second lessee should enter, and be evicted by the first lessee, this would cause a suspension of the rent reserved on the second lease: however, the successor suffers no prejudice, because though he cannot distrain for the second rent during the continuance of the first lease, and though the re-entry of that first lessee should amount to an attornment, and give the rent thereon reserved to the second lessee, yet the
bishop

[1 Bl. Rep.
626.]

bishop, or his successor, may always maintain an action of debt against the second lessee for the rent, and so will in all events be sure of one rent.

But this lease, though it be not either against the letter or meaning of the exception in 1 *Eliz. c. 19.* yet since it is not warranted by 32 *H. 8. c. 28.* it must be confirmed by the dean and chapter, as before the 1 *Eliz. c. 19.* all leases not pursuant to 32 *H. 8. c. 28.* must have been, to bind the successor: and such confirmation must be in the (a) life of the bishop who makes it.

of such concurrent lease in the vacation of the bishoprick, is good enough. 4 Leon. 78. *Quare.*

But after such lease for years, the bishop cannot make a lease for three lives to be good by way of concurrent lease, though it be confirmed by the dean and chapter; but such second lease, whether it be made to begin presently, or by way of lease or grant in reversion, and attornment upon it, is against the exception in the 1 *Eliz. c. 19.* and, by consequence, shall not bind the successor: for the words of the exception are, *other than leases for three lives, or twenty-one years,* in the disjunctive; so that there ought to be only one, or only the other in being at a time against the successor, and not both together: for which reason also, after a lease for three lives, the bishop cannot make a lease for twenty-one years to bind the successor, though with the confirmation of the dean and chapter, because then there would be both a lease for three lives and twenty-one years in being at a time, which that statute does not allow of: and if the lease in reversion for three lives should be good as a concurrent lease, then would the successor have no remedy for the rent thereon reserved during the first lease; not by distress, because the possession was only a pledge for the rent reserved on the first lease; not by action of debt, because that does not lie for rent reserved on an estate of freehold during the continuance thereof (b); not by assize, because he had no seisin of it; and though *ex vi termini* the rent is payable, because after the lease for years determined the lessor may distrain for all arrears; yet that is only a possibility or contingency; for the lease for years may outlast the three lives, and then they, by reason of their reversionary interest, having the present rent of the lessee for years, if they all die before the determination of the lease for years, the bishop and his successors will lose all that rent, and so have nothing to maintain hospitality, or sustain the dignity of their sees, which this statute of 1 *Eliz. c. 19.* intended chiefly to provide for. And though the first lease were for three lives, and the second only for twenty-one years, yet that will not bind the successor; because though an action of debt might be maintained against the lessee for years for the rent reserved on his lease during the lease for lives, yet such lease for lives and years at the same time is against the words of the exception of 1 *Eliz. c. 19.* which are in the disjunctive. It may also happen that the lessee for years is worth nothing, and then if the three lives should outlive such subsequent lease for years, the successor of the bishop would lose all that rent, and so suffer in his revenues, against the design

10 Co. 60.
b.
Moor, 109.
Co. Lit. 45.
(a) But one
book says,
that con-
firmation

Co. Lit. 44.
b. Palm.
466., &c.
5 Co. 2.
Moor, 253.
Leon. 59.
Latch. 241.
2 Brownl.
162. Cro.
Eliz. 141.
And. 193.
Ley, 78.
Cro. Eliz.
111.

Vide tit.
Rents.

[(b) See
5 Geo. 3.
c. 27.]

and meaning of the act ; which proves, that the concurrent lease holds place only where *both are for years* ; so that the certain determination of the first, and commencement of the second are known immediately upon the making thereof, and that the successor will in all events be sure of a remedy by way of distress, for the one rent and the other, as they respectively commence ; and also by action of debt or covenant upon the contract in the mean time, if such concurrent lease should be construed to pass a reversionary interest, and entitle him to the rent reserved upon the first lease by an unwary or wilful attornment of the first lessee. And this concurrent lease for years has not escaped the censure of some learned men, though being adjudged at first in the *Exchequer Chamber*, by a majority of ten judges, it has been ever since allowed for law ; for my lord chief justice *Vaughan* says, that this concurrent lease is neither within the letter or meaning of the statute 1 *Eliz. c. 19.* the words of which are, *other than for twenty-one years, or three lives*, and in that case there is another lease *in esse* than for twenty-one years, or three lives ; for there are two leases *in esse*, and so more than the statute warrants ; and that the statute intended, when the first lease expired, the bishop who should then be, should have the advantage to make a new lease, which by allowing such concurrent lease may be prevented perpetually, except by way of remainder : and as for the intent of the statute, he said, though the party is estopped in pleading, yet the jury are not, but may find the truth of the case ; and if the party dies to whom such concurrent lease is made, neither his executors nor administrators are estopped ; for otherwise they would pay a rent for nothing, which would be in their own wrong, and against the right of the testator.

3 Keb. 378.
Degg. 111.

Comp. In-
comb. 243.

It appears by the cases before-mentioned, how and in what manner bishops may make concurrent leases, not being restrained therefrom by the 1 *Eliz. c. 19.* In the same manner likewise might deans and chapters, masters and fellows of any college, and other persons mentioned in the 13 *Eliz. c. 10.* not being restrained therefrom by that statute ; but that being found a great mischief, was remedied and qualified by 18 *Eliz. c. 11.* which makes all leases by any of the said ecclesiastical, spiritual, or collegiate persons, or others of any of their ecclesiastical, spiritual, or collegiate lands, tenements, or hereditaments, whereof any former lease for years is in being, not to be expired, surrendered, or ended, within three years after the making of any such new lease, to be void and of none effect ; so that within these bounds they may likewise make concurrent leases for years.

2 Brownl.
134. 158.
164.
Moor, 875.
Co. Lit.
45. b.

The dean and chapter of *Norwich*, 8 *Eliz.* made a lease to *A.* for ninety-nine years, to begin after the end of a former lease then in being, which happened 35 *Eliz.*; afterwards, in 42 *Eliz.* the dean and chapter made a lease to the plaintiff for three lives, rendering the antient rent quarterly, and covenanted to acquit and save harmless the plaintiff and the lands demised to him, during the lease, by reason of any lease made by them, or any of their predecessors ; and livery was made upon it ; but it did not appear whether

whether it was the same dean that made the lease to *A.*, nor that *A.* had then entered: and now the plaintiff being evicted by the assignee of *A.*, brought his action of covenant against the dean and chapter; and had judgment by reason of the express covenant; and also, because it did not appear that the dean, who was party to the plaintiff's lease, was dead: for it was agreed, that the lease to the plaintiff would be void against the succeeding dean by the 18 *Eliz. c. 11.* because there were then above three years of the first to come: but *Coke* held, that though there were four or five, or more years of a former lease to come, yet if that former lease were surrendered within three years after the making of a second lease for years, such surrender would make good the second lease; but if the first lease were for years, and the second for lives, then, though there were but two years to come of the first lease, yet the second would be void, which perhaps may be for the reasons mentioned in the concurrent leases by bishops: but if so, then what my lord *Coke* says in the same case must be a mistake, that if the plaintiff (whose lease was for three lives) had procured *A.* within three years to have surrendered his lease to him, that this would have made good his own lease, which cannot be if what he said before be true; *ideo q.*

But for such houses, and so much land, as by 14 *Eliz. c. 11.* they may let for forty years, they cannot make leases in reversion or concurrent leases, because that statute expressly forbids leases in reversion thereof; and the 18 *Eliz. c. 11.* relates only to the 13 *Eliz. c. 10.* as appears by the following case.

In trespass upon special verdict it was found, that the dean and chapter of *Paul's* made a lease for forty years, of a House in *London*, to begin presently there being then ten years of a former lease to a stranger to come; and the court held this second lease merely void by 13 *Eliz. c. 10.* and not warranted by 14 *Eliz. c. 11.* which makes good leases of houses in market-towns for forty years, so they be not made in reversion; and this lease, though it be made to begin presently, yet there being another lease *in esse*, is a lease in reversion; for so much as remains of the former lease. And so it was resolved in *C. B.* 14 *Car. 2.* in the case of *Wynn* and *Wild*, of a lease of the dean and chapter of *Westminster*; and though this was properly a concurrent lease, yet being a lease in reversion, it is forbidden within the express words of the 14 *Eliz. c. 11.* and so void against the successor.

A vicar having made a lease for years of a house in a market-town, and of lands thereunto appertaining, anno 1672, when there were but two years of that lease to come, let it to another for twenty-one years from *Michaelmas* then next, reserving the ancient rent during the term, payable at the four most usual feasts, or within ten days after, and this lease was confirmed by the archbishop, (patron of the vicarage,) and the dean and chapter of *Canterbury*; if the succeeding vicar was bound by this lease, was the question? and adjudged by all the court, that he was not. 1. It was adjudged, that the death of the vicar, by eighty days, did not make such non-residence as would avoid the lease within the statute

Comp. Incumb. 344.

Cro. Eliz. 564.
Hunt and Singleton.

Vent. 246.
Carter, 9.

Vent. 245.
2 Lev. 61.
3 Keb. 46.
107. 193.
Bayly 7.
Murin.

of non-residence. 2. That though the rent were reserved at the usual feasts, or within ten days after; (and therefore as it was urged, the term ending at *Michaelmas*, would be expired before the last day of payment; though for the other days it was agreed to be for the successor's advantage, because the predecessor might die within the ten days, and then the successor would have that whole quarter's rent;) yet the court resolved that the reservation was good in the whole, and that being reserved during the term, there should be no ten days given to the lessee for the last payment, according to *Barwick* and *Foster's* case, *Cro. Jac.* 227. 233. 3. It was adjudged that this was a lease in reversion, and so not warranted by 14 *Eliz. c. 11.* which, as to houses in market-towns, repeals the 13 *Eliz. c. 10.* but excepts leases in reversion; and this lease being to commence at *Michaelmas* next, was properly a lease in reversion, and differs from a grant of a reversion. And further, they all, but *Hale*, held, that if this lease, in this case, had been made to commence presently, yet it would have been void, there being another lease in being, so that for so many years as were to come of the former lease, it would be a lease in reversion; and they held, that the 18 *Eliz. c. 11.* which permits concurrent leases, so that there be not above three years of the former lease, &c. extends only to 13 *Eliz. c. 10.* and recites that, but not the 14 *Eliz. c. 11.* nor makes any alteration thereof: but *Hale* doubted of this, and inclined rather contrary, that if the lease had been made to commence presently, it had been good; because there were not then three years of the former lease to come, and he thought the 18 *Eliz. c. 11.* was a qualification as well of leases upon the 14 *Eliz. c. 11.* as upon 13 *Eliz. c. 10.* 1. Because the 14 *Eliz. c. 11.* is an appendix to 13 *Eliz. c. 10.* and only enlarges it as to houses in cities and market-towns; and therefore the 18 *Eliz. c. 11.* reciting the 13 *Eliz. c. 10.* does, by consequence, recite also the 14 *Eliz. c. 11.* 2. Because there is such a connection between all the statutes concerning ecclesiastical persons, that they have been generally taken in the construction of one another; and that though 32 *H. 8. c. 28.* is not recited either in the 1 *Eliz. c. 19.* or 13 *Eliz. c. 10.* yet a lease is not warranted by those statutes, unless it hath the qualifications required by 32 *H. 8. c. 28.* 3. From the great rummage it would make in leases, if they should be void, when there was ever so little of a former lease unexpired.

Foph. 8.

The president and scholars of *Magdalen College* in *Oxford* made a lease of a house, &c. for twenty years, and ten years before the expiration thereof made a lease to another for twenty years, to begin after the expiration of the first lease; though this be, in strict propriety, a lease in reversion, yet it was said to be good, and to stand well within 14 *Eliz. c. 11.*, because these contracts or leases do not intermix, but the one stands well with the other, and both together do not exceed the forty years comprised in the statute, which doth not hinder leases to be made from a day to come: but this opinion is (a) denied to be law, and seems also to be expressly against the foregoing cases, where such lease to begin

(a) 1 Vent.
246.
3 Feb. 107.

gin at a day to come, there being then another lease *in esse*, is condemned, though both did not exceed the term of forty years in the whole. Carter, 12. 15.

Rule 4. That such Leases are not to exceed three Lives, or twenty-one Years.

A fourth rule to be observed for making these leases good in law is, that they do not exceed three lives, or twenty-one years, from the making thereof; therefore, if a bishop makes a lease for four lives, and one of them dies in the life of the bishop, so that at his death there are but three lives in being, yet the lease is void against the successor, because being void by 1 *Eliz. c. 19.* at the time when it was made, no subsequent accident can make it good. 10 Co. 61. b. 62. a.

So, if a lease be made for three lives in this manner, *viz.* to one for life, remainder to a second for life, remainder to a third for life, this lease is void against the successor; because, otherwise the two first would be dispunishable of waste during their lives, by reason of the intermediate remainder; and so dilapidations, and other mischiefs, which the statutes intended to provide against, would be let in. Cro. Car. 95. Owen and ApRees, Hetley, 22. [This point was made and argued at the bar in the case referred to, but the court gave no opinion upon it.]

So, if an archdeacon makes a lease for three lives, according to the statutes, and the lessees make a lease for 100 years, which is confirmed by the archdeacon, bishop, dean, and chapter, yet such lease shall not bind the successor: or, if a bishop makes a lease for three lives, reserving the ancient rent, and they make a lease for 100 years, if three men so long live, which is confirmed by the bishop and chapter; yet may the successor avoid this lease, and yet these are out of the words of the statutes; but if they are not to be construed to be within the meaning thereof, the statutes would signify nothing, and all ecclesiastical persons, by such evasions, might get out of the acts, and make what alienations they pleased. Ley. 74. Bishop of Hereford's case. 5 Co. 15. a.

If a lease be made to *A.* for the lives of *B.*, *C.*, and *D.*, this is a good lease; for a lease to one for the lives of three others, and a lease to three for their lives, is all one, within the intent of these statutes; for three lives are the measure of the estate, which is all the statutes require. But a lease for ninety-nine years, determinable on three lives, seems not good within the statute of the 1 *Eliz. c. 19.* & 13 *Eliz. c. 10.* which make void all estates, gifts, grants, &c. (other than for three lives, or twenty-one years); so that a lease for ninety-nine years, determinable on three lives, being neither of those, falls within the disability and voidance of the first part of those acts. Cro. Jac. 76. Baugh v. Hains.

But a lease by husband seised of lands in right of his wife, or jointly with his wife, of an estate of inheritance for sixty years, if they should so long live, was held sufficient to bind the wife surviving, within the 32 *H. 8. c. 28.* and no question made of it; the only dispute there being, Whether the wife ought to have joined in the indenture of lease? and that such leases for ninety-

(a) 8 Co.
70. & vide
3 Keb. 595.

nine years, determinable on three lives, are good within that statute, appears from the reasoning in (a) *Whitlock's case*; where it is adjudged, that if a man has power to make leases absolutely or generally, (as the several persons comprised in the statute of 32 H. 8. c. 28. have,) and a proviso or restraint comes after, (as in that act it does,) that such leases shall not exceed the number of twenty-one years, or three lives at the most; there, a lease for ninety-nine years, determinable on two or three lives, is good within the first part of the act, and not made void by the last part thereof, because it does not exceed the three lives thereby allowed, though it be not directly for three lives; but now a lease for ninety-nine years, determinable on three lives, upon the statute of 1 Eliz. c. 19. & 13 Eliz. c. 10. is just the reverse of this; for the first part of these acts makes void all estates, gifts, grants, &c. by the persons therein-mentioned, and the last part saves only leases for twenty-one years, or three lives, &c. so that this lease being void by the first part of these acts, and not within the saving of the last part, being neither for twenty-one years, nor three lives, shall not bind the successor within these acts; *sed quare de hoc.*

Leon. 306.
5 Co. 6. b.
8 Co. 70. b.

But though these statutes provide that these leases shall not exceed twenty-one years, or three lives, yet such leases for fewer years, or lives, are good; for the intent of the statute was only to abridge the power of making long and unreasonable leases, by reducing them to such a determinate number of years or lives, which they should not exceed, but might be made as much under as the parties pleased.

Rule 5. Of what Things Leases may be made to bind the Successor.

Co. Lit.
44. b.
47. a.
142. a.
144. a.
7 Co. 51.
Leon. 333.
Bro. tit.
Leases, 17.
21. tit.
Grant, 44.
59.

A fifth rule to be observed in the making of leases upon these statutes to bind the successor is, that they must be made of lands or tenements corporeal and manurable, whereto resort may be had for the rent reserved thereout by way of distress; for otherwise the successor may be without any remedy for the rent, and so dilapidations, poverty, and all the other mischiefs the statutes intended to provide against, be let in. Therefore, leases of fairs, markets, liberties, franchises, advowsons, commons, piscaries, offices, hundreds, tithes, or any other incorporeal inheritance, though with confirmation of the dean and chapter, or other persons required by law to confirm the same, will not bind the successor.

For the better understanding of this rule, it will be necessary to take notice of some distinctions, which plainly arise out of the books.

5 Co. 3.
Jewel's
case. Cro.
Jac. 111.
173.
Moor, 778.
Palm. 175.
2 Sord. 563.
Hard. 326.

1. All the books agree that a lease for three lives of tithes, or other incorporeal inheritances before-mentioned, will not bind the successor, though the ancient rent be reserved, and the lease or grant confirmed; the reason whereof is, that if such lease or grant should be good against the successor, he would then be without the tithes, &c. and have no remedy for the rent thereon reserved;

served; for distrain he could not; because there would be no place wherein to take any distress, the things leased or granted being perfectly incorporeal and invisible; an assise he could not have, because either he had not seisin, or, if he had, yet there would be nothing to put in view of the recognitors; and an action of debt he could not maintain during the lease, because, being for three lives, that is, an estate of freehold, which will endure no action of debt so long as it continues; and so the successor would, in such case, have no manner of remedy for the rent reserved, which would be against the express provision and intent of the several acts.

2. It is held likewise in some books, that a lease for twenty-one years of such incorporeal inheritances, though they have been usually demised, and the ancient rent be thereout reserved, that yet this is voidable by the successor within these statutes; because though the rent reserved be good by way of contract between the lessor and lessee, and that debt may be maintained for recovery thereof; yet, they say, it is not such a rent as is incident to the reversion, nor shall pass with it to the successor; and therefore the successor having no remedy for the rent, shall not be bound by the lease.

But this point seems to have been shaken by contrary resolutions since *Jewel's case*, for some books expressly hold such lease for years to be good against the successor; because, they say, he has remedy for the rent, by action of debt, and say it has been so adjudged, and take the diversity (a) between such lease for years and a lease for life: also, they say, that the rent issues out of the tithes in point of render, though not in point of remedy, because no distress can be taken for it; but that is supplied by the action of debt which lies for such rent, and shall devolve on the successor; and that such rent does not lie only in privy of contract, as a sum in gross, but is incident to the reversion, otherwise the successor could not have it, being only privy to the estate, not to the personal contracts of his predecessor; and to this opinion the court inclined, but thought it a point of great consequence, and therefore, to avoid it, gave judgment on another point which was clear.

hereditaments by ecclesiastical persons, whether for lives or for years, as good as if the leases were of corporeal hereditaments, and gives action of debt to the successor for rent reserved on freehold leases.]

3. All the books agree that a lease for three lives, or twenty-one years, of a manor, with the advowson appendant, or of lands or houses, and of tithes usually let therewith, reserving the ancient rent, &c. is good, and shall bind the successor within these statutes; for though the rent does not issue out of the advowson, tithes, &c., in point of remedy, yet the rent is greater in respect thereof, and the successor has his remedy for the whole rent upon the lands, or other corporeal inheritances let therewith; (*sed quare*, if the tithes should be worth 2 or 300*l. per ann.* and the lands not above 4 or 5*l. &c.*;) and *Vaughan* proves this from the express words of 13 *Eliz. c. 10.* which are, That all leases by any spiritual or eccle-

5 Co. 3.
Co. Lit. 44.
b. 47. a.

Cro. Jac.
112.
Moor, 778.
Ley, 76.
Palm. 105.
Hard. 326.
Raym. 18.
Lev 108.
2 Sand. 304.
Keb. 63.
2 Keb. 727.
[(a) This
diversity is
no longer of
any import-
ance; for the
5 Geo. 3.
c. 17.
makes leases
of tithes
and other
incorporeal

Cro. Jac.
453.
Moor, 201.
5 Co. 4.
2 Roll.
Abr. 451.
Vaugh. 203.
204.
2 Sand. 303.
Leon. 333.

ecclesiastical persons, having any lands, tenements, tithes, or hereditaments, (other than for twenty-one years, or three lives, &c.) shall be void; so that the statute plainly shews, that some way or other tithes may be leased for twenty-one years, or three lives; and if they cannot be leased singly, it must be with lands usually letten therewith.

Lev. 333.
Corbet and
Cleer, cited.

Therefore, where the dean and chapter of *Norwich* leased a parsonage and common of pasture, rendering rent, and 1 *E. 6.* surrendered their possessions to the king, and afterwards the king granted the parsonage, without speaking of the common of pasture; it was held, that the patentee of the parsonage should have all the rent, and no apportionment should be in respect of the common; because all the rent issued out of the parsonage, and nothing out of the common.

Cro. Eliz.
690.
Armiger v.
Bishop of
Norwich
and Holland.

A bishop, having an advowson appendant to a manor in right of his bishoprick, grants the advowson for twenty-one years, and this was confirmed by the dean and chapter, yet held within the restraint of 1 *Eliz. c. 19.* and void against the successor; because, as was said, it was not such an hereditament whereout a rent could be reserved: but a better reason seems to be, because no rent was at all reserved, and then, to be sure, neither the predecessor nor successor could have any benefit thereof by way of contract, or otherwise; nor did it appear to have been usually letten.

Palm. 174.
Bishop of
Oxford's
case. Co.
Lit. 47. a.
142. a.
186. b.

The bishop of *Oxford*, having *primam vesturam sine tonsuram* of certain lands, after 1 *Eliz. c. 19.* lets to the plaintiff for three lives, rendering the ancient rent, and dies, and his successor, the now defendant, enters upon him, and takes the hay: it was urged, that this was not like the lease of a fair, because this concerned land, and was to be taken upon the land, and so the successor was not without remedy, because he might distrain the grafs when it was cut: but *per curiam*, if the bishop had had *vesturam*, or *primam vesturam*, or *tonsuram*, from such a day to such a day, this had been such an hereditament as might have been leased; for there the bishop or his lessee might have mowed, and after fed it, during that time, and then the successor might have distrained the cattle; but here the bishop had only *primam vesturam*, viz. only the cutting of the grafs once within such a time, and then his interest is at an end, and he cannot after feed it; so that it is no hereditament within the statute, whercof any lease can be made to bind the successor.

5 Co. 15. a.
10 Co. 60. b.
Cro Eliz.
207. 440.
And. 241.
Mod. 204.
2 Mod. 56.

If a bishop, dean, and chapter, or any other person restrained by these statutes, grant the next avoidance of any church which they have in right of their bishoprick, deanry, &c., though with confirmation of all persons interested therein, yet the successor shall avoid it; for this is such an hereditament as the statutes intended to restrain them from binding their successors by, and no rent can be reserved out of it; for such grant of the next avoidance can bring no manner of benefit to the successor.

4 Co. 24.
Ley, So.
Comp. In-

It hath been several times held, that bishops; or other ecclesiastical persons, are not restrained either by the 1 *Eliz. c. 19.* or 13 *Eliz.*

13 *Eliz. c. 10.* from making grants of copyhold lands in fee, in tail, or for lives, or for any number of years, according to the custom of the manor, and that no confirmation is necessary to make such grants good, though they are made by a sole corporation, as by a bishop, prebendary, &c.

Leon. 4. 4 Leon. 117. Heydon's case.

The bishop of *Winchester*, 5 *Eliz.* with confirmation of the dean and chapter, granted an annuity or annual rent out of lands, parcel of the possessions of his bishoprick, with clause of distress to it, *pro consilio impenso & impendendo pro termino vite sue*, and died; the grantee brought debt against the executors of the bishop for arrears incurred in his lifetime; and the only question was, whether upon the 1 *Eliz. c. 19.* this grant was void against the successor, so that the grantee could not maintain a writ of annuity against him, but only an action of debt against the executors of the grantor? the case does not appear to be adjudged, but it is cited in several books, that the annuity was determined by the death of the grantor; for though this was not parcel of the possessions of the bishoprick, but only issuing out of them, yet if the successor should be charged with it, this would tend to his prejudice and impoverishment, which the statutes intended to prevent.

So, where a writ of annuity was brought against the successor upon a grant made by his predecessor, and confirmation by the dean and chapter, yet it was adjudged that it would not lie, because it was not averred that it had been usually granted, though it was averred to be reasonable; and it appears by these cases, that if to avoid this act a writ of annuity were brought against a parson or vicar, who prayed in aid of the patron and ordinary, and upon default, judgment were given for plaintiff, this likewise is within the equity of the said act, and void against the successor: so, if a writ of annuity were brought against a bishop upon title of prescription, or otherwise, and judgment given against him by verdict or confession, yet this is restrained by 1 *Eliz. c. 19.* because the bishop is charged with the annuity in respect of the bishoprick; and therefore the successor would be charged with the arrears incurred in the life of the predecessor, as it is held 48 *E. 3. c. 26.* and so it would tend to the diminution of the revenues, and impoverishing of the church.

So, if a rent-charge be granted by any corporation restrained by these statutes, though this rent-charge be not parcel of their possessions, yet it is against the equity of the statutes, and void against the successor; for if bishops, and other ecclesiastical persons, were at liberty to grant what rent-charges they thought fit, and that these should be good and binding upon the successor, he might have his possessions so clogged and incumbered, as not to be able to keep up hospitality, or sustain the dignity of his function, and so the good design of these acts be wholly eluded.

In covenant, plaintiff declared of a lease by the predecessor of the defendant, in which was a covenant, that he and his successors would pay all taxes during the term, and assigns for breach, that such a tax was made by Parliament for the royal aid, and that the plaintiff

cumb. 253.
& vide
 3 Co. 7.
 Moor, pl.
 276.
 Sav. 66.

Dyer, 370. b.
 10 Co. 61.
 5 Co. 15.
 Hob. 97.
 Roll. Rep.
 164. 171.
 Cro. Car. 49.
 11 Co. 69.

10 Co. 61.
 Bishop of
 Chester's
 case, cited
 30 *Eliz.*
 Rot. 346.
 Ley, 72.
 Bridg. 30.
 S. C. cited.

5 Co. 15. a.
 Roll. Rep.
 171.

Vent. 223.
 2 *Lev.* 68.
 3 *Keb.* 69.
 Davenant
 v. Bishop of
 Salisbury.

plaintiff was forced to pay it, the defendant refusing to discharge it, *unde actio accrevit*, &c. and the only question was, whether this were such a covenant as should bind the successor as incident to the lease by 32 H. 8. c. 28. ? for it is clear, if the bishop had made a covenant or warranty, this had not bound the successor at the common law, without the consent of the dean and chapter ; and if it should now be taken that every covenant would bind the successor, the statute of 1 Eliz. c. 19. would be of no effect : but it was held, this covenant would not bind the successor ; 1. Because it is not averred that such covenants had been used in former leases, as it ought to have been, to prove it an ancient covenant. 2. If this covenant had been in former leases, yet it could not bind to pay this new tax by Parliament ; but it must have been intended only of such as were then in use, *viz.* synodals, pensions, tenths granted by the clergy, procurations, &c. it was held however, that this covenant would not avoid the lease.

Of grants of offices by bishops, &c. within these statutes, *vide tit. Offices.*

Rule 6. What shall be said a usual Letting to Farm upon the several Statutes, and by what Persons.

A sixth rule to be observed in the construction of leases upon these statutes arises upon the words of 32 H. 8. c. 28. that *that act shall not extend to any lease of any manors, lands, tenements, or hereditaments, which have not most commonly been letten to farm, or occupied by the farmers for the space of twenty years next before such lease thereof made.* The first construction that prevailed was, that this letting to farm within the twenty years ought to be by some person who had an estate of inheritance therein ; and therefore, if the heir in tail were in ward of the king for twenty years, and during that term the king, or his grantee, made leases of lands of the ward which had not been usually letten or occupied in farm for twenty years before, this letting them to farm by the king, or his grantee, during the twenty years wardship, is not such a letting to farm within the intent of the statute, as will enable the heir in tail, when he comes of age, to make a lease for twenty-one years, or three lives, of those lands, to bind his issue. So, if such lease were made by tenant by the curtesy, tenant in dower, or the like, of lands which before that time had not been most usually letten to farm for twenty years, their letting to farm of such lands for the greater part of twenty years, will not impower the issue in tail, when he comes into possession, to make a binding lease of such lands within the intent of the statute ; for the intent of the statute was only to make good leases of such parts of the land as had been before usually letten by those who were owners of the inheritance, and best knew what was most proper to be let out, and what not, and therefore did not intend to establish leases made of any other possessions than those, which the owners of an estate of inheritance therein had, for the greater part of twenty years, thought fit to

Co. Lit.

24. a.
Dyer, 271.
Degg. 106.

to lease to farm; for if the leases of tenant in dower, tenant by the curtesy, guardian by knight's service, or such like, who, having only a particular estate therein, would be for making money of it all, and letting out the whole for rent; if leases made by such for eleven or twelve years, or more, according to the time they lived or had interest therein, should be a letting to farm within this statute; then might the issue in tail, when he came into possession, make a lease for twenty-one years, or three lives, of the capital messuage or mansion-house, or, perhaps, of the whole estate, because those particular tenants had so done for eleven or twelve years, or more; and then if such tenant in tail should die the next day, his issue would not have a house to put his head in; which never was the intent of the statute.

So, where the temporalities of a bishoprick come into the hands of the king, and he keeps them twenty years, or more, and during that time lets to farm for eleven years, or more, lands which had not been before accustomedly letten, and then appoints a successor, and restores him the temporalities, he cannot by any lease bind his successor, for those lands, which had no other warrant for his leasing thereof, than only that the king, whilst the temporalities were in his hands, had let them to farm for eleven years or more; and he might have let the bishop's palace, or the demesnes about it; and then if the successor might likewise make a binding lease thereof for twenty-one years, or three lives, and should die, or be removed soon, the mischief intended to be remedied by the statute, in giving the farmers a secure and lasting possession during their leases, would introduce a much greater upon the successor, by shutting him out of all the houses and lands belonging to the bishoprick for twenty-one years, or three lives; and so, instead of maintaining hospitality, as the books speak, would occasion nothing but quarrels and contentions. So, for the same reason, a letting to farm by a disseisor or any other who has not a rightful estate of inheritance, though it be for the greater part of twenty years, is not a letting to farm by such a person as will enable the tenant in tail, bishop, or other person intended to be provided for by this statute, to make any binding lease of lands which were not accustomedly letten to farm for the greater part of twenty years, by those who had a rightful estate of inheritance therein.

But as the mischief would be great, on the one hand, to construe the statute in such a manner, as would empower the persons before-mentioned to determine of what parts and possessions leases might be made good and binding against the successors, issues in tail, and other persons intended to be bound by the act; so, on the other hand, a construction not less hurtful to them seems to have obtained upon the same words of the statute; which provides, *That it shall not extend to any lease of any manors, lands, tenements, or hereditaments which have not most commonly been letten to farm, or occupied by the farmers for the space of twenty years next before such lease thereof made*; upon which words it is held, that the lands to be leased within that statute must be such, and such only, as have been letten to farm, or occupied for eleven years, or more,

Palm. 175.
6. Bishop
Oxford's
case.

Co. Lit.
44. b.
Cro. Eliz.
708. Maj.
at let and

Malet.
Sir John
Mervyn's
case.

at one or several times within the twenty years next before the lease for twenty-one, or three lives, to be made; so that if lands have been formerly let to farm never so long, or often, yet if the tenant in tail, or bishop, should keep them in his own hands fifteen or twenty years, these lands cannot be leased for twenty-one years, or three lives, to bind the issue or successor, till they have undergone a probation of twenty years longer, and within that time have been letten to farm, or occupied by farmers for eleven years, or more: so, if the temporalities come to the hands of the king, and he should keep the lands usually letten in his own hands forty or fifty years, more or less, and then restore the temporalities to the successor, he must then begin to let them to farm, till they have run out in farmers hands eleven years at least, otherwise he can make no lease for twenty-one years, or three lives, within this statute. So, if a disseisor after a lease for twenty-one years, or three lives, expired, enter upon the bishop, or tenant in tail, and hold the lands twenty years, or more, and then the bishop, or tenant in tail, or their issue or successor, enter, though these lands were demiseable, and actually demised, within the statute, but just before the disseisor entered, yet now they cannot be again leased for twenty-one years, or three lives, till they have been in farmers hands for eleven years at least; and so it is in the power of the king, the disseisor, nay of the bishop, or tenant in tail himself, to evade and elude the intent of the act, by keeping the lands ten or twelve years in their hands; and though they die, or are removed presently, yet the successor or issue can have no benefit of the statute till after eleven years at least.

(a) Where
the case was,
that the
Archbishop
of York in
1604, made

These reasonings and instances were pressed and urged in a (a) case by *Twisden* and Chief Justice *Keeling*, against *Windham* and *Moreton*, and they thought them so considerable, that it put them upon finding out a more easy and natural construction.

a lease for three lives, rendering the ancient rent; in 1630, this lease was surrendered, and the lands remained unlet till 1662, when the archbishop made a lease thereof to the plaintiff's lessor, rendering the same rent as was reserved in 1604, and died, and the then archbishop entered, and let to the defendant; and whether these lands, not having been let since 1630, could be leased again, was the question? and *Twisden* and *Keeling*, for the reasons herein mentioned, held they might. Lev. 212. Sid. 316. Raym. 165. 2 Keb. 213, *Pemle v. Stern*.

For they held, that the clause consisted of two parts in the disjunctive, and if either of them were observed, it was sufficient to warrant the leasing for three lives, or twenty-one years, within the intent of the statute: the words are, that *that act shall not extend to any lease of any manors, lands, &c. which have not most commonly been letten to farm*; this is the first part of the disjunctive, and is general: the other part is, *or occupied by the farmers thereof by the space of twenty years, &c.* and they thought the most natural and genuine meaning of the words to be, that the lands to be leased must either be such as have been most commonly letten, that is, such as are not reputed part of the demesnes of the bishoprick, or such as have been occupied by the farmers thereof by the space of twenty years, &c., that is, if the bishop has let out part of his demesnes to farm, and the occupation of the farmer has been

been approved for twenty years together, as not any ways inconvenient to the bishop, the statute will presume that they are lands fit to be let. And as to the authorities against this opinion, *Twifden* said, in *Mallet's* case, that point came in unnecessarily; and *Keeling*, that it came in on a foolish argument, and therefore was of no great weight; and so in *Sir John Mervin's* case, the point never came in question, but only *dictum fuit pro lege*; and as to my lord *Coke*, (though he were a grave and learned man,) yet he was not infallible, nor did he desire to be accounted so, and this opinion of his was not judicial, that if it had come to an argument he might possibly have thought otherwise; for *Keeling* said himself was of that opinion, till he came to consider the case, and weigh the inconveniences of that construction: and it was said, that queen *Elizabeth* kept the temporalities of the bishop of *Ely* above twenty years in her hands, and yet no question of his leases after: and they said likewise, that the lord *Coke's* inference was false, and not warranted by the statute, *viz.* that if it had been leased for eleven years it would be sufficient; for the first part of the statute, as to leasing, seems to refer to a more ancient time: also it was held, that if the other construction prevailed, these lands, or any other which continued unlet for eleven years, could never after be let again for twenty-one years, or three lives, because they were not most accustomedly letten, *&c.*, by the space of twenty years, which makes it the more reasonable to reject such construction: *sed quære*, if by letting them again to farm for eleven years, or more, the power given by the statute to lease for twenty-one years, or three lives, be not set up again? but *quære*, whether since as it appears before, the letting to farm by the king, or a disseisor, *&c.*, is not sufficient within this statute, whether likewise their keeping it in their hands for eleven years, or more, be of any prejudice to the bishop, or his successors, or to the tenant in tail, or his issue? for if the statute only intended letting to farm by the bishop or tenant in tail himself, then all the objections before-mentioned seem to lose their force, unless where the bishop, or tenant in tail, keep the lands undemised in their own hands for eleven years or more.

A lease made by the predecessor of the plaintiff for three lives, rendering rent, and confirmed by the dean and chapter; the defendant claiming under it avers that it was the usual and ancient rent, and the land usually demised; the plaintiff replies, that it was usually before that lease retained in the hands of his predecessors for hospitality, and traverses *absque hoc, quod fuit magis usualiter dimissa, &c.*: it was held a good traverse; for since 32 H. 8. c. 28. appoints that the ancient rent shall be reserved, it is thereby implied that the land should have been usually demised, otherwise the ancient rent cannot be reserved.

Another thing required by the statute is, that these leases be made of lands usually letten to farm, *&c.*, upon which words it hath been adjudged, that a demise by copy of court-roll is sufficient; for that is in judgment of law but an estate at will; and

Cro. Eliz.
874. Bishop
of Hereford
and Scorey.

Co. Lit.
44. b.
6 Co. 37. b.
Cro. Jac. 76:
2 Jon. 29.
without
Moor, 759.

Raym. 167. without question, lands demised at will by those who have the inheritance, rendering rent, are lands accustomedly letten to farm within the said act; and so it was ruled 7 *Eliz.* in Sir *John Mervin's* case, where tenant in tail let a copyhold by indenture, rendering the same rent as before, and held a good lease within 32 *H. 8. c. 28.* and *Williams* said, he had known it thrice so adjudged in his time, in the case of tenant in tail.

Moor, 199. But where tenant in tail had power, by a particular act of parliament, to make leases for life, lives, years, or at will, after the custom of the manor, yielding the true and ancient rent, &c., and he made a lease both of freehold and copyhold by a deed at common law, reserving such a rent; this was held not to be warranted by the statute as to the copyhold, because the statute speaks of leases at will by the custom of the manor; which imports, that the statute did not intend that copyholds should be demised otherwise than they were before the statute, and that was by copy of court-roll, not by a lease for years, and the rent to be reserved thereon was customary rent, not rent upon a lease for years at common law.

Rule 7. What Rent is to be reserved; And herein,

1. That there must be a Rent reserved.

Moor, 593. As to this the statute is express that a rent must be reserved; and therefore where the college of all *All Souls* in *Oxford* made a lease without reservation of any rent, though it was but to try a title, yet it was held void, the statute being express and positive; and therefore no construction or pretence can be urged to avoid the statute: but in that case it did not appear that no rent was reserved, but only the plaintiff had not shewn that there was any reserved, and yet there might be, in the lease; and if not, the defendant ought to shew it; and so the exception disallowed.

2. That this Rent must continue due, and be payable to the Lessors and their Successors.

5 Co. 6. a. This also is so strictly required by the statute, that it hath been held, that if a bishop, tenant in tail, &c., make a lease of land, the ancient rent whereof was 10*l.* and reserve but 5*l. per annum* during his life, and 10*l. per annum* after his death, to the issue or successor, yet this lease shall not bind, because the rent originally reserved was not pursuant to the statutes; though there can be no pretence of prejudice to the issue or successor, more than if the bishop, or tenant in tail, &c., should release the rent, or any part of it, during their own lives, which surely they may do: *ideo quare?*

3. That such Rent must be the same, or more in Quantity than hath been reserved within twenty Years next before such Lease made; And herein,

1. What

1. What shall be said to be the ancient Rent, where Variety of Rents have been reserved, or something formerly reserved now omitted or varied.

As to this, where variety of rents have been reserved, as formerly 10*l.* then 20*l.* then 30*l.* and lastly 40*l. per ann.* or *à contra* formerly 40*l.* then 30*l.* then 20*l.* and lastly 10*l. per ann.*; the 10*l.* in the one case, and the 40*l. per ann.* in the other case, are the rents to be reserved on any new lease to be made; but with this diversity between leases made by virtue of the several statutes before-mentioned, and leases by virtue of powers in private conveyances and settlements; for upon leases made by virtue of the several statutes before-mentioned, this was the measure immediately after these acts passed, and must continue so still; because the same acts being to warrant every successive lease as well as the first, there can be no variation of the rent in any other lease to be made from the rent, which, upon construction of those statutes, was in the first lease, made by virtue thereof, settled to be the antient and unaccustomed rent; and consequently, the variety of rents in such leases must have been only before the statutes: but upon leases made by virtue of powers in private conveyances and settlements at this day, reserving the old and accustomed yearly rent, or the most ancient and accustomable yearly rent, there, the rent reserved on any lease then in being, or upon the lease made last before such settlement or conveyance, seems to be the measure of the reservation upon any lease after to be made by virtue thereof; for the intent of such power, as well in such settlements as upon the several acts before-mentioned, was only that they, who were to make leases by virtue thereof, should not put the estate in any worse condition than it was at the time of such settlement, or of those acts made, but keep it in the same plight and condition as it then respectively was; and the rent reserved last before the making of such settlement, or of those acts, may well be called old or ancient in respect of the new rent to be reserved on such lease, to be made after such settlement, or after those acts. But the Lord *Cowper*, in the case of Lord (a) *Mobun* and *Orby*, seemed to make a doubt of this construction of the words *ancient and accustomable rent*, and thought the last rent no certain rule to go by; for suppose it were leased once at a greater, and twice at a less rent, he thought the ancient rule must be that reserved on the first lease; for the two last may be made by a tenant in fee, who was not bound to reserve the ancient rent, but might let it for nothing, if he pleased: but upon the 32 *H. 8. c. 28.* or the same words in private powers, *viz.* so much yearly rent, or more, as hath been most accustomably yielded or paid within twenty years next before such lease thereof made, if a greater rent had been reserved before the twenty years, yet the reserved within the twenty years, though it were less, must be the measure of the reservation upon leases to be made by virtue of that statute, or of private powers, worded in the same manner. But if within the twenty years it had been let once at a greater

Hard. 325,
326.
Morice v.
Antrobus,
per Hale.

(a) 2 Vern.
531. 542.
Preced.
Chan. 257.
S. C. Gild.
Eq. Rep.
45. S. C.

[Where the leases, on which the rent has been reserved within the twenty years, have been sometimes with fines, and sometimes without, Lord Cowper's rule seems the best: in any other circumstances Lord Holt's rule appears to be the more proper one. See Pow. on Powers, 549.]

and twice at a less rent, then the question will remain, which of the reservations will be the measure of the rent to be reserved on any two new leases to be made? and how far the opinion of my Lord Chancellor *Cowper* will outweigh the opinions of my Lord Chief Justices *Hale* and *Holt* is considerable, though their opinions seem to fix a standing rule to go by, whereas his leaves it at great uncertainty, from which no rule can be formed; for it may have been let twice formerly at a less rent, and once, on the last lease, at a greater; and if the first reservation in this case, being greater, shall be the rule, why should not the two first, in this case, though they are less; for his reason seems to turn upon the priority and antiquity of the rent, so that the first rent, according to his opinion, and the last rent, according to their two opinions, are to be the measure of the reservation.

6 Co. 37.
Cro. Jac.
76. Co.
Lit. 44. b.
Moor, 759.
Dean and
Chapter of
Worcester's
case.
[Com. Rep.
312.
Coventry v.
Coventry.]

In some cases, leases, by virtue of these statutes, will be good, though there be an omission of things formerly reserved, or a variation in the rent reserved in point of time: therefore, where the dean and chapter of *Worcester* were seised of the manor of *H.* in fee, in right of their church, of which manor one *G.* was copyholder for life, under the ancient rent of 8 s. and 8 d. payable at the four quarter-days of the year, and heriotable at the death of the tenant, and the copyholds of that manor were grantable by custom for three lives; the dean and chapter 24 *Eliz.* by indenture under their common seal, demise the said lands to *G.* and his assigns for the lives of *A.*, *B.*, and *C.*, and the survivor of them, rendering 8 s. and 8 d. half-yearly, and without reservation of any heriot; and after this lease made the dean dies, and his successor and the chapter enter to avoid this lease upon 13 *Eliz. c. 10.* (among other reasons); 1. Because the ancient rent was not reserved by reason of the loss of the heriot. 2. Because the rent was not payable, as it used to be; for before, it was payable quarterly, and now, it is reserved payable half-yearly, which is not so beneficial to the successor: but it was adjudged, that, notwithstanding these objections, the lease was good, and should bind the successor; for the 13 *Eliz. c. 10.* does not avoid any lease, if the accustomed rent or more, be reserved; and here the accustomed rent is reserved, and the omission, or loss of the heriot, is not material, because that was not a thing annual or depending upon the rent, but perfectly casual and accidental. 2. That though the rent was formerly reserved quarterly, and now half-yearly, yet the lease is good, and so would have been if it had been reserved only yearly; for the words of the act are, *whereupon the accustomed yearly rent, or more, shall be reserved*; so that if the rent be reserved yearly, the words of this act are satisfied, and this word *yearly*, not being in *Mountjoy's* case, makes the difference. And yet this rent had not all the beneficial qualities the other rent had; for whilst it continued copyhold, the lord might have entered for a forfeiture upon the denial or non-payment of the rent, which now, upon this lease thereof, at common law, he cannot do.

5 Co. 4. b.
5. b.

If the rent was anciently payable in gold, and it is now reserved payable in silver, this lease should not bind the successor; for the variation may be prejudicial to the heir or successor, by the fall of silver; and though the same may be said were it reserved in gold, as it used to be, yet by continuing the species of reservation formerly made, the lessor hath used all the precaution the statute required, and the accidental fall after can be no ways imputed to him.

5 Co. 4. b.
5. b.

But if a quarter of corn was anciently reserved, and now a lease is made, reserving eight bushels of corn, this is good; for the reservation is the same both in quality, value, and nature, and differs only in words.

5 Co. 4. b.

A precentor or chanter of St. Paul's, being seised of the parsonage of S., in *jure cantuariæ*, leased a portion of tithes for two years, rendering 8 *l. per ann.* and reserving pasturage for a colt in the land of the lessee; and the lease being expired, his successor made a lease for twenty-one years of the said portion of tithes, rendering 8 *l. per ann.* but omitted the running of the colt; yet the lease was held good, because it was a thing reserved out of the lands of the first lessee only, which the successor could not reserve, such first lessee not being his tenant of the tithes: otherwise perhaps, if the reservation had been general.

Palmer. 106.
Euseben and
Dennis.

2. In what Manner such Reservation is to be made.

All that seems necessary here to be observed is, that there must be a particular mention or specification of the sum intended to be reserved, as well upon leases to be made by virtue of these statutes, as upon leases by virtue of powers in private conveyances and settlements; for otherwise the heir, or successor, would be put to infinite trouble, vexation and expence, if the reservation might be allowed to be made in the same or as general terms, as the power itself was; and the necessity of averring and proving what was the ancient and accustomed rent were to lie upon them.

Therefore, where a bishop was seised, in right of his bishoprick, of three manors which had been usually let together at the rent of 32 *l. per ann.* and made a lease of the said three manors, except such and such parts thereof, rendering the ancient, usual, accustomed yearly rent, and the rents and services at the days and times usually accustomed, without specifying any rent or sum in particular; it was adjudged, that this lease should not bind the successor, because the usual and accustomed rent was 32 *l. per ann.* where all the said three manors had been let without any exception; whereas now part being excepted, that which was the usual and accustomed rent for the whole, cannot be said the usual and accustomed rent for part; and then the reference being general to the ancient and accustomed rent, nothing at all is reserved, and, by consequence, the successor is not bound by such lease. This appears to be the reason in the book for the avoidance of that lease, and being sufficient for the purpose, there needed no other: but it will appear by the following case, that if the whole three manors had been let without any ex-

Cro. Car. 95.
Owen v.
Thomas.
3 Keb. 380.

ception, yet the reservation in such general terms would have been sufficient to have avoided the lease.

Trin. 1706.
in Chanc.
Lord Mohun
and Orby.
Eq. Abr.
345. pl. 5.
2 Vern.
531. 542.
Gilb. Eq.
Rep. 45.
Preced.
Chan. 257.
3 Chan. Rep.
102.
10 Mod. 473.

Fitton Gerard was tenant for life, with power to make leases for twenty-one years, or three lives, so as upon every lease of such lands as have been usually letten, and fines taken for them, the old accustomed rent, or more, be yearly reserved; and so as upon every lease of other lands not usually letten, or fines taken for them, there be reserved the best improved rent that can be gotten for the same, and the lessees to execute counterparts thereof. *Fitton* by indenture 21 Decemb. 1702, demises to the defendants all such lands as have been usually letten, and fines taken for them, for ninety-nine years, if three persons should so long live, with a reservation in these words, *yielding and paying therefore the respective old and accustomed yearly rents*; and if this reservation was pursuant to the power, was the question? And my Lord Chancellor *Cowper*, being assisted with the two Chief Justices *Holt* and *Trevor*, decreed, that this lease was not good to bind the remainder-man; but my Lord Chief Justice *Holt* differed in opinion, and held this lease good. 1. Because the reservation being in the very words of the power, if the power was good, the reservation must be so too; for the same words must have the same meaning in both; and if a sum certain had been reserved, yet it must have been averred to have been the ancient and accustomed rent, or more; and therefore this reservation, in the words of the power, may be helped by such an averment, and consequently is good. 2. That if any of the lands comprised in this lease had not been anciently let, though the reservation in such manner as to them would be void, yet the lease would remain good as to the others. 3. Though all the lands were comprised in this one deed of lease, yet the remainder-man, who is to have all the deeds in his custody, might easily distinguish them, as well as if they had been let by several leases, as they were formerly. But my Lord Chancellor and *Trevor* held this lease void against the remainder-man, and not pursuant to the power. 1. Because it was never intended that the words of the power should be turned *verbatim* into a reservation in leases; and to say, that if the words in the power are good, they cannot be bad in the reservation, is a strange position. Suppose in the power to make leases it were provided, that in every such lease there should be inserted such covenants as are usual in leases in that county, and a lease were made in the very words of the power, would this be good? Certainly not; nor could it be aided by any special verdict, finding the covenants usual in that county. 2. The question in this case is not between the lessor and lessee (between whom perhaps the lease may be good, and the rent recoverable); but the question is, as to the remainder-man, whose remainder and inheritance is to be charged by a power which is to be taken strictly, and is not pursued; for the intent thereof was, that a certain rent might be reserved upon every lease to be made, so that he in remainder may know how to come at it, and form his action for the recovery thereof, which, as this reservation is, he cannot do, but will be involved in per-

[1 Burr.
121.]

petual controversy and uncertainty; for he must not only aver and avow that the sum he distrains for is the ancient rent, but must also prove it; for if the tenant can shew another more ancient rent, then he may nonsuit the remainder-man, and so *toties quoties* he distrains or avows for any rent, the tenant by shewing that another rent has been reserved, may baffle him and keep the land in spite of his teeth, without any rent at all, till he is so lucky as to hit upon the true sum reserved upon every several lease, which will be very difficult for him in remainder to do, and is no ways agreeable to the power. But if a certain sum had been reserved, and the counterpart shewn under the tenant's hand, he must either shew a more ancient rent, or it will be presumed for the plaintiff; and if he should shew one more ancient, the consequence of that will be the avoiding of his own lease, which, to imagine he should attempt, is absurd; and without defeating the lease he can never avoid payment of the rent when it is reserved in certainty; but as it is reserved here, it is wholly uncertain. And my Lord Chancellor said, it was the first attempt that ever was made to delegate the power generally that was to have been executed particularly, and was a new invention tending to introduce perjury, forgery, and frauds, and therefore was not to be countenanced.

So, in the same case, where tenant for life had made a lease of the lands not usually letten, reserving therefore the best and most improved rents for the same, according to the words of the power; this was held so utterly uncertain, that nothing was offered to support it.

Lord Mohun
v. Orby.

But a case was therein cited, where Mr. *Venables of Cheshire* had power, by a settlement, to make leases of lands anciently demised, reserving, at least, 12 *d.* for every *Cheshire* acre; and he made a lease of all the lands anciently demised, *reserving all the rent intended to be reserved*; and though these words were very general and uncertain in themselves, the reservation was held good, because it might easily be ascertained by the reference of 12 *d.* at least, for every *Cheshire* acre, because it is known what a *Cheshire* acre is; and that may by admeasurement be at all times ascertained, and depends not upon uncertain evidence.

Lewson v.
Figgot.
3 Ch. Rep.
61. 76.

[So, where a power was given to lease, provided that two parts in three of the improved value be reserved as a rent, and the reservation was made in the very terms of the power; it was holden that the lease was nevertheless good; and that unless proof were made of a greater value than had been constantly paid and accepted of by the remainder-man, such sum must be taken as two parts in three of the full value of the premises at the time of making the lease, which, or the greater value, if so proved, was to be continued to be paid, whether the premises rose or fell in value.]

Audley v.
Audley,
2 Ch. Rep.
82.

A precentor of *St. Paul's* made a lease of lands, the ancient rent whereof was 40 *l.* and a couple of capons, and he now reserves only the 40 *l.* and takes a covenant from the lessee to pay yearly, over and above the 40 *l.* a couple of capons, or 6 *s.* and 8 *d.*, yet this was held such a covenant as amounted to a reserva-

Hard. 325.
Morrice and
Antrobus.

tion, and therefore the lease good against the successor. But as the lease in this case was made to baron and feme, and the baron only covenanted in that manner, which would not bind his wife if she survived; so for that reason it was holden the successors would not be bound.

3. Where the Addition of more Land, with or without the Addition of more Rent, shall avoid such Leases.

Ley, 74. 77. Cro. Eliz. 340, 341. Tanfield v. Rogers. Tenant in tail, or any spiritual person, in right of the church, seised of a manor whereof the copyholds and services have not usually been let, but only the freehold demesnes, makes a lease of the whole manor, reserving such a sum only as amounted to the ancient rent: this lease shall not bind the issue or successor. But where the reservation was several, *viz.* reserving the ancient rent in certainty for the lands anciently let, and another distinct rent for the copyhold and services, not usually before letten; the lease was holden to be good as to the lands anciently let, because for them the ancient rent was reserved.

Gro. Jac. 458. 3 Bulf. 290. Smith v. Bole. A prebend usually let, with exception of all crab trees, &c. at 17 *l. per ann.* was now let for three lives at that rent, without the exception, and adjudged that the lease was void to bind the successor, because there was more let than had been anciently; for by the exception of the trees, the fruits and boughs, and soil itself, were excepted, which now by this lease pass to the lessee; and so more being let than formerly, it is not warranted by 32 *H. 8. c. 28.* and then the rent thereout reserved cannot be said to be the ancient rent, and, by consequence, is made void against the successor by 33 *Eliz. c. 10.*

5 Co. 5. Moor, 197. Lord Mountjoy's case. Co. Lit. 44. b. Tenant in tail by special act of parliament having authority to make leases, &c. *reddendo verum & antiquum redditum*, makes a lease of lands anciently demised, and of an acre of waste not before demised, reserving the ancient rent, and so much more as the acre of waste was worth; and yet held, that this addition of acre of waste spoiled the whole lease, because the rent being entire in the reservation issued out of the whole, and out of every part thereof, and the acre of waste being never demised before, it could not be said *verus & antiquus redditus*, which issued out of that which never before yielded any rent at all.

5 Co. 4, 5. Co. 139. Cro. Car. 23. 3 Keb. 380. If two farms have usually been let severally, the one for 20 *l.* and the other for 10 *l.* and a bishop, tenant in tail, &c. makes a lease of both together, rendering 30 *l. per ann.* and dies, &c. this lease shall not bind the issue or successor, for the ancient rent issuing formerly out of the two farms severally, according to the afore-said proportion, now issues wholly out of each, and out of every part of each; and where before the rents were several, now they are entire; and it was said to be but wantonness, to save parchment and paper, to join them together in one lease, when they were usually, and ought to have been let severally; and there was no necessity or colour of convenience to join them in one lease; and if he might join two, he might as well join twenty, which

which would be very prejudicial to the successor, since it is a kind of seignory and prerogative to have several tenants: therefore, if 40 *l. per ann.* had in that case been reserved for the two farms, which is 10 *l. per ann.* more than the ancient rent of both; yet this shall not bind, not because more is reserved than the ancient rent, (for that the statute allows,) but because by their being joined, if the tenant should prove insolvent, the loss would be greater upon the issue or successor.

Devisee for life, with power to make leases, whereupon the old and accustomed yearly rent shall be reserved, entered and built a new house upon the land, and then made a lease for twenty-one years, reserving only the ancient rent, &c.: it was insisted, that this could not be said to be the ancient rent, because part of it is issuing out of the new house: but the justices would not suffer it to be argued, but held the rent to be well enough reserved.

Leon. 147.
148.
Read and
Nash.

4. Where a Reservation of the whole Rent, or only *pro Rata* on a Lease of Part, shall be good.

On a special verdict the case was in substance no more than this: A bishop seised of two manors in right of his bishoprick, which had usually been let for 67 *l. 1 s. 5 d. per annum*, now makes a lease for twenty-one years of one of those manors only, reserving the whole rent: and if this was a good lease within the statute 1 *Eliz. c. 10.* was the question? The objections against it were: 1. That the remedy for the rent was not so ample and beneficial as it was before; for before, the rent issued out of both, now, out of one only, and the statute is to be taken strictly, to prevent dilapidations and decay of spiritual livings. 2. That this was not the old accustomed rent, because it did not issue out of the same lands, but out of less; and if that be allowed, you may leave but a moiety or quarter part, or but one or three acres, to answer 100 *l. per annum*. 3. It was objected, that now the bishop could not lease the other manor at all; for if for the ancient rent, perhaps it is not worth so much; if for less, it is not the ancient rent: or supposing he could lease the other manor for less rent, yet the ancient rent, which the statute chiefly designed to provide for, will not be at all the better secured; for now being reserved out of one manor only, that will be the only fund to answer it for the future; and if the value of lands should fall, as probably they may, there will be no sufficient security or distress for the old rent, though perhaps the new rent, being less, will be abundantly secured: and of this opinion was *Vaughan* and *Ellis*; but *Atkins* and *Windham* held it a good lease: and after the death of *Vaughan*, *North* being of the same opinion, it was adjudged a good lease, and this judgment affirmed in *B. R.* upon a writ of error; for the ancient rent being reserved, the statute is satisfied, and what is not in lease is in the bishop's own hands. And though the distress for the ancient rent be not so large, yet the bishop cannot complain, having the residue of the lands in his own hands, or out upon another lease: and by *Windham*, if a bishop should enlarge a garden

Mod. 203.
2 Mod. 57.
3 Keb. 192.
372. 583.
595.
Pollexf.
176.
1 Freem. 92.
119. 165.
179.
Thread-
needle v.
Lynam.

or orchard, it would be unreasonable so to tie him up, as to force him to hold the residue of the tenancy in his own hands, and never suffer him to demise it again, because he cannot reserve the ancient rent, as that issued out of every part of the old land: but he agreed, that if the bishop in this case had made a lease of both manors, reserving the ancient rent out of one of them only, this would not have been good to bind the successor, because he departed with the whole land chargeable with the ancient rent, and yet confined the successor's remedy for such rent to part of the lands only: but in this case he having the residue of the lands in his own hands, it is clearly out of the mischief of the statute.

5 Co. 5, 6.

If lands usually let at such a rent descend to two coparceners in tail, each may let her own part, reserving rent *pro rata*: for it would be unreasonable that the frowardness or perverseness of one sister, in not complying to join in a lease with the other sister, should hinder them both from making leases at all: and the descent, which caused the coparcenary, was an act of law, which they could not prevent or hinder, and the acts of law do no injury to any one. So, if a manor was usually let at 10*s. per annum* rent, and a tenancy escheats, and then a lease is made of the whole manor, reserving 10*s. per annum*, this is good, though the rent issues also out of the tenancy, and that never was in lease before; for the escheat was the act of law, and by that the feignory being extinct ought not to turn to the prejudice of the lord. But if the lord had purchased the tenancy, he could never have leased it within 32 H. 8. c. 28. or the other statutes, because the purchase was his own act; and therefore the tenancy having never been leased before, no ancient rent can be reserved thereout, no more than a manor which had never been leased can now be leased by virtue of any of those statutes.

Co. Lit.

44. b.

3 Keb. 379,
380.

5 Co. 4, 5.

{(a) But according to the Touchstone, p. 279. if tenant in tail of land let a part of it that hath been accustomedly let, and reserve the rent *pro rata*, or

The books are not agreed, whether a bishop, tenant in tail, or any spiritual person, &c. of lands usually let for a certain rent, may make a lease of part thereof, reserving rent *pro rata*; but the better opinion seems to allow of such leasing (a), because this in effect is the ancient rent; and otherwise, perhaps, they could not lease at all, if they had not a power of dividing the great farms; and *Mounjoy's* case, which is contrary, they say, was adjudged upon a private act of parliament for enabling a particular tenant in tail to make leases, which neither his estate nor the law would allow of (as the lease there was for 300 years): but upon the other statutes, if all the circumstances thereby required are observed, a lease of part, rendering a proportionable rent, seems to have no inconvenience in it, or be any ways against the true meaning of the statutes.

more than after the rate; this is not a good lease. And it seemeth to be exceedingly doubtful, whether bishops, &c. have the power of dividing their estates, and leasing them out in smaller parcels: for as the whole estate is no longer answerable for the whole rent, the security is lessened by such a division; and there may possibly be an entire deficiency of remedy for portions of the rent, by reason of the failure of tenants, deficiency of distress, produce, &c. of the parcels out of which they are payable. When therefore a division is deemed necessary, it hath been judged safest, on account of this possible injury to the successor, to apply for the aid of the legislature. See two acts to this purpose in the 34th and 35th of the present king empowering the Bishop of Ely to grant out estates belonging to his see in several smaller parcels.—However, in point of fact, partitions have been made without the sanction of parliament, and that, under the opinion of some of the ablest lawyers in the profession. *Idem quere.*

Rule 8. That such Leases must not be made without Impeachment of Waste.

The last rule to be observed in the making of leases upon these statutes is, that they must not be made without impeachment of waste. Though this is expressly provided for in the 32 H. 8. c. 28. only, yet it hath been resolved upon the 13 Eliz. c. 10. and held upon 1 Eliz. c. 19. that the several persons therein respectively mentioned are by the equity thereof restrained from making leases punishable of waste: for if, as the preamble speaks, long and unreasonable leases are the chiefest causes of dilapidations, and the decay of all spiritual livings and hospitality, much more would they be so if they were made punishable of waste; and therefore those statutes being made to prevent such unreasonable leases for the future, must, by consequence, prohibit the power of committing or suffering waste. But if bishops be not restrained by 1 Eliz. c. 19. from making such leases, yet they must at least be confirmed by the dean and chapter, otherwise they will be void by 32 H. 8. c. 28.

And although they are confirmed, yet if the lessee should go about to commit waste, he may be stopped by prohibition, and attached if he persist in it; for so may the bishop himself, or any ecclesiastical person, if they commit waste, either in cutting down the timber trees, or pulling down or defacing the houses or possessions of the church: and such waste is also a good cause of deprivation; and as the bishop or other ecclesiastical person cannot justify the doing of such waste, other than for reparations, fuel, or such like necessities, no more can their tenants or lessees, who derive under them.

But where a prohibition was moved for, to hinder a parson from the digging of lead and coal mines in his glebe, the court denied it, because he having the fee in him in as high a manner as ever any body will have it, if he cannot open the mines, they will never be opened at all. Nor is this opening of mines any cause of deprivation by the canon law: and the reason of prohibiting the cutting down of trees in the church-yard by 35 E. 1. stat. 2. is, because they were planted in defence of the church, and also because such cutting them down is waste *. And it is said in one book, that the parson hath such an estate in him, that he may maintain an action of waste, for waste in cutting down trees by his termors.

Note; Leases may be made without impeachment of waste two ways; 1. Expressly by words in lease, declaring the same: or, 2. Impliedly by construction of law; as if a lease be made for life, the remainder for life, this is punishable of waste, and so not warranted by the statutes; because in waste the place wasted is to be recovered, as well as treble damage, which the reversioner in this case cannot do, without destroying the intermediate estate for life.

But if a lease be made to one for three lives, this lease is good, because it is not punishable of waste, and the occupant, if any

Co. Lit. 44.
b. 45. a.
6 Co. 37. a.
Dean and
Chapter of
Worcester's
case.
Palm 468.
Comp. In-
cumb. 357.

11 Co. 49.
98. b.
3 Bull. 91.
Moor, 917.
Zaker's case.
2 Roll. Abr.
813.
Hob. 36.
Drury v.
Kent.
3 Inst. 304.
Godb. 259.
2 Bull. 279.

Sid. 152.
Lev. 107.
Keb. 557.
Count de
Rutland's
case.
* They
may be cut
down for the
repair of the
chancel or of
the church
by the stat.

6 Co. 37.
Cro. Car.
93.

happen, shall be punished for waste within the statute of *Gloucester*, c. 5. which gives an action of waste against any one that held in any manor for term of life or years; and an occupant in this case holds for term of life.

(F) Of Leases by Parsons, Vicars, and others, with respect to other Qualifications.

AS to leases made by parsons, vicars, and others, having benefices or promotions with cure of souls, these things are to be observed:

1. That parsons and vicars are expressly excepted out of 32 *H. 8.* c. 28.; so that they are not, as other sole corporations, enabled by that statute to make any leases to bind their successors without the confirmation of the patron and ordinary, but remain as they did perfectly at common law, for any thing in that statute. 2. That they are not restrained by 13 *Eliz. c. 10.* from making leases for twenty-one years, or three lives: but then such leases must not only be confirmed by the patron and ordinary, but must also be made with conformity to the eight rules or qualities mentioned, otherwise they will not bind the successor. 3. They, as well as others, are restrained by 13 *Eliz. c. 10.* from making leases for any longer time, notwithstanding any confirmation or conformity to the rules before-mentioned.

But it is necessary that the lessor be a priest; for if a mere layman be instituted and inducted to a benefice, and make a lease for twenty-one years, or three lives, which is confirmed by the patron and ordinary, and then the incumbent be deprived *quia merè laicus*; yet the lease remains good, and shall bind his successor, because it was made by a *parson de facto pro tempore*, whereof the law takes cognizance by the solemnity of his institution and induction; and the people can take notice of no other. So, if the parson were after deprived for contracting matrimony when the law was that priests could not marry, or for not reading the articles within two months, &c. yet his leases being confirmed by the patron and ordinary remain good against the successor, as well since the statutes before-mentioned, as they did at common law before the making thereof; because being made by a lawful incumbent *pro tempore existente*, they ought not to be impeached by any subsequent act or neglect of the parson.

But if he who makes such lease be but a supposed incumbent, or be in a church by a super-institution, or the like seeming title, and so be reputed the legal incumbent, he cannot make a lease to bind after his death, or the death of the true incumbent: therefore, where *A.* was made lawfully bishop of *Ossory* in the time of *Edw. 6.* and after, in the time of *Queen Mary*, *B.* was consecrated bishop of that diocese, living *A.*, who was not deprived, and then *B.* made a lease of parcel of the possessions of the bishoprick, and then *A.* died, and *B.* survived him about three years; yet after his death it was adjudged, that this lease should

not

Co. Lit. 44.
Comp. Incumb. 359.

Moor, pl. 836.
Cro. Eliz. 775.
Roll. Abr. 476.
Dyer, 292, 293.

Cro. Jac. 552.
Palm. 22.
Bishop of Ossory's case.

not bind the successor, because it was a voluntary act, and tended to the impoverishing of the successor, and *A.* not being deprived, continued bishop still; so that the consecration of *B.* was a mere nullity, and never made him bishop of that diocese: but yet they held, that all judicial acts done by *B.* as institutions, certificates, &c. were good, because they were necessary, and could then be performed by no other.

So, if one were appointed bishop of a diocese, but never ordained or consecrated, (as, it is said, in the time of *Ed. 6.* some were not,) then leases made by such bishops, though confirmed by the dean and chapter, will not bind their successors, because for want of ordination and consecration they are no bishops at all, and consequently, their acts null and void in themselves. But if one were lawful bishop at the time of making such lease, no deprivation after will avoid the lease, because there was nothing wanting when it was made, and the deprivation after shall not impeach that which was good in itself before.

Bro. tit.
Leases, 68.

If the incumbent, be he clerk or layman, were under the age of twenty-one years at the time of making a lease, yet shall not his successor avoid it for this cause, if there was nothing else wanting; for though he ought not to have been admitted under age, yet after such admission he continued rightful parson till deprived, and then all acts done by him in the mean time continue good and unavoidable; and in his politick capacity, as parson, his age is not material or imputable.

Bro. tit.
Age, 89.

Though leases made by parsons or vicars be in all respects well made, yet by non-residence they become void by virtue of the statute 13 *Eliz. c. 20.* which is as followeth; viz. "That the livings appointed for ecclesiastical ministers may not by corrupt or indirect dealings be transferred to other uses, be it enacted, That no lease hereafter to be made of any benefice or ecclesiastical promotion with cure, or any part thereof, and not being impropriated, shall endure any longer than while the lessor shall be orderly resident, and serving the cure of such benefice, without absence above eighty days in any one year, but that every such lease immediately upon such absence shall cease and be void, and the incumbent so offending shall for the same lose one year's profit of his said benefice, &c. and that all chargings of such benefices with cure with any pension or profit out of the same to be yielded or taken, other than rents upon leases to be made according to the meaning of this act, shall be utterly void: Provided, that every parson, by the laws of this realm allowed to have two benefices, may demise the one of them, upon which he shall not be then most ordinarily resident, to his curate only that shall there serve the cure for him; but such lease shall endure no longer than during such curate's residence without absence above forty days in any one year."

This statute, though it extends only to those who have the cure of souls, yet by reason of the multiplicity of parsonages and vicarages in *England*, hath been held to be a general law, whereof the judges are bound to take notice, without pleading it.

2 Roll. Abr.
465.
Yelv. 106.
1 Brownl.
203.
4 Co. 120.

Upon

Yelv. 106.
Brownl. 208.
Jenning v.
Haichwait.

Upon an action of trespass brought, and not guilty pleaded, the jury found the defendant vicar of *D.* and that he such a day leased his vicarage to *J. S.* for three years, rendering rent, which *J. S.* assigned one acre, parcel thereof, to the plaintiff, and that the defendant was absent several quarters in one year, viz. sixty days in each quarter: it was adjudged for the defendant, that this was such an absence as avoided his own lease within that statute.

Noy, 116.
Sidner v.
Calvert.

So, it is said to have been adjudged, that if a parson be absent at several times, viz. ten days at one time, and twenty days at another, and so till eighty days be fulfilled in one year, that this is such a non-residence within the statute as shall avoid his lease.

Bulf. 111.
Sheppard v.
Twoulfie.

[This case in Bulstrode hath been since denied to be law: such a construction would entirely defeat the statute, for at this

And yet, where it was found by special verdict, that a parson made a lease of his glebe and tithes, and was absent by the space of eighty days in a year; yet because it was also found that he did upon all occasions resort to his parish, and perform divine service in the church four days in a week, and duly serve the cure thereof, though he lived in another parish, which was a non-residence within the statute *H. 8.* yet this was not such a non-residence as should avoid his lease within the statute of 13 *Eliz. c. 20.* for that, they held, must be a non-residence for eighty days together at one time in the year.

rate an incumbent need be resident only five days in one year. *Quilter v. Mussendine*, Gilb. Eq. Rep. 228.]

Degg. 126.

[(a) This allegation is clearly unnecessary. *Mills v. Ettridge*, Bunb. 210.]

By this it appears, the surest way to avoid the lease (if the case will bear it) is, to allege the absence for eighty days together (a), because then the cure must most certainly be neglected: but since it also appears, that if the cure were not neglected, though the absence were for eighty days in a year at several times, that this should be no avoidance of the lease; therefore the other cases, which hold the absence at several times, till eighty days be accomplished in a year, sufficient to avoid the lease, must be intended such an absence as was accompanied with the neglect of the cure; otherwise, the cases will not be consistent and uniform.

Degg. 126.

And note; Where any lease becomes void for absence above eighty days, no confirmation of the patron and ordinary can save it. [In such case it is merely void, and the lessee cannot maintain an ejectment even against a stranger, who enters without any colour of title.]

Doe v. Barber, 2 Term Rep. 749.

Cro. Eliz. 88.

Gosnal and

Kindlemarsh. Cro.

Eliz. 490.

Earl of Lincoln v.

Hoskins.

If an information be brought on the statute 13 *Eliz. c. 20.* or if that statute be pleaded to avoid a lease, bond, or covenant, it ought to be said, not that the incumbent was absent, but also that he was absent eighty days & *ultra*: for to say, eighty days, and nothing more, is not sufficient within this statute, which says above eighty days; for he may be absent eighty days, and come again in the night of the 80th day; and if so, he is no offender within this statute; and therefore it ought to be expressly alleged, and not by implication.

3 Bulf. 202.
Rudge and
Thomas.

So, it must also be said, that he was absent eighty days & *ultra* in a year; otherwise it will not be good, for so is the statute expressly.

Also,

Also, it must be shewed that the incumbent was voluntarily absent (a); for if he were absent, or did not serve the cure, by reason of sickness, suspension, or because he was inhibited by the ordinary from serving the cure, or was ejected by any out of the parsonage-house, or upon the account of any other restraint, this is no such absence as will avoid any leases, &c. within these statutes.

Cro. Eliz.
590. Moor,
540.
6 Co. 21.
Butler and
Goodal,
Cro. Eliz.
100. Col-
lins v.
Vaughan,

Moor, 448. [(a) But it is now settled, that it is not necessary to aver that the absence was voluntary, for if it be otherwise, it is matter of excuse, which it lies upon the parson to shew. Mills v. Etheridge, Bunb. 210. Quilter v. Mustendine, Gilb. Eq. Rep. 228. Note; A sequestration of a benefice under a *fiery facias* is no impediment to the serving of a cure; so that the non-residence of the incumbent in such a case is a clear avoidance of any lease he may have entered into. Doe v. Mears, Cowp. 129.]

These last cases prove the unreasonableness of the construction that has been made of this statute in the following case: Where a parson, after 13 Eliz. c. 20. made a lease to one, for twenty-one years *a die consecrationis*, of lands usually letten, rendering the ancient rent; and this was confirmed by the patron and ordinary; then the parson died; and the question was, if his death was such a non-residence as that eighty days after being incurred should avoid the lease? Moor reports this case, that the judges were divided in it, and that though judgment was given against the defendant, under-lessee of A. in an action of debt brought by A. for the rent; yet the reason of it was for his misrecital of the statute, whereby he would have avoided the lease to A., and, consequently, the under-lease to himself. But Cro. reports the case to be adjudged, that the death of the parson was a non-residence within that statute to avoid his leases; for, the court said, the intent of the statute was to provide against dilapidations, and for maintenance of hospitality, and therefore must be intended to avoid leases, not only for non-residence, but also by the death or resignation of the parson; for otherwise dilapidations would be in the time of the successor, and he could not maintain hospitality. And Hale says, this was adjudged, as it is reported by Cro. by the opinion of three judges against one, but says, it was a hard opinion: and therefore (b) where the same point came again in question, it was adjudged that the death of the parson was not such a non-residence as should avoid a lease duly made. 1. Because the intent of the statute was only to oblige the parsons to residence, by imposing a forfeiture upon them of a year's value of their benefices if they did not reside, which could not be, if death were a non-residence within that statute; for, immediately upon the death of the incumbent, all the profits of the living, except for supply of the cure in the vacation, belong to the successor; how then could the bishop sequester them for the use of the poor, for a whole year, as the statute directs? 2. It is plain the statute meant a wilful negligence, because it says, *the party so offending*; but death is involuntary, and cannot be punished. 3. The statute of 14 Eliz. c. 11. which allows leases of houses in market-towns for forty years, would be of no effect, if death should be interpreted a non-residence to avoid them. 4. The confirmation of the patron and ordinary would be to no purpose, and

Cro. Eliz.
123.
Moor, 270.
Mott and
Hales.

(b) 2 Lev.
61. Vent.
244-
3 Keb. 46.
107. 193.
Bayly and
Munday.

and their permission to make leases for twenty-one years or three lives, with such confirmation, would be vain and idle, if such leases should continue no longer than during the parson's life; for he might have made them good during his own life, without any such permission or confirmation. 5. These cases above cited prove that the non-residence, within this statute, must be such as is voluntary; and therefore sickness, inhibition by the ordinary, &c. which are involuntary, are a good excuse of non-residence within this statute, and so have been allowed.

(b) 14 Eliz.
c. 11. § 15,
16.

But for as much as several evasions were found out to frustrate and elude the true intent of the said statute of 13 *Eliz. c. 20.* therefore, by another (b) act of parliament it was provided as followeth; *viz.* "That whereas sundry evil disposed persons have de-
"frauded the true meaning of the last mentioned statute, by
"bonds and covenants, of suffering other persons to enjoy ec-
"clesiastical livings, and the fruits thereof, for that such bonds
"and covenants are not in law taken to be leases, although in-
"deed they amount to as much; be it therefore enacted, That
"all bonds, contracts, promises, and covenants hereafter to be
"made, for suffering or permitting any person to enjoy any be-
"nefice or ecclesiastical promotion, with cure, or to take the
"profits or fruits thereof, (other than such bonds and covenants
"as shall be made for assurance of any lease heretofore made,) shall, to all intents and purposes, be adjudged of such force
"and validity, and not otherwise, as leases by the same persons,
"made of such benefices and ecclesiastical promotion, with cure;
"and be it further declared and enacted, That all leases, bonds,
"promises, and covenants, of and concerning benefices and ec-
"clesiastical livings with cure, to be made by any curate, shall
"be of no other or better force, validity, or continuance, than
"if the same had been made by the beneficed person himself,
"that demised, or shall demise the same to any other curate."

(c) 43 Eliz.
c. 9.

And by another (c) act for the continuance of the said statutes of 13 *Eliz. c. 20.* and 14 *Eliz. c. 11.* there is another clause, by way of addition, "That all judgments to be had, for the intent
"to have and enjoy any lease contrary to the said statutes, shall
"be deemed void, in such sort as bonds and covenants are ap-
"pointed to be void for that purpose."

The statute of 13 *Eliz. c. 20.* as appears by the express words thereof, extends only to leases to be made after that statute: therefore, where a parson made a lease for sixty years before the 13 *Eliz.* which was confirmed by the patron and ordinary, and then the parson died, and his successor, after the statute of 14 *Eliz. c. 11.* gave a bond that the lessee should enjoy the lease during the term, and after became non-resident for above eighty days in one year, and so would have avoided both the lease and the bond; yet in an action of debt brought thereupon, it was adjudged, that neither of them were within either of those statutes; for as to the lease, that being made and duly confirmed before 13 *Eliz. c. 20.* was good at common law; and then the bond given for enjoyment of such lease, though it were given after 14 *Eliz. c. 11.* yet was neither within the words nor intent of that statute, which extends only
to

to bonds given after that statute, for enjoyment of leases, contrary to 13 *Eliz. c. 20.* which this lease, that was made before, cannot be said to be: nor could the successor himself avoid this lease, so that the bond given for the enjoyment thereof cannot be unlawful.

Also, the said statute of 13 *Eliz. c. 20.* extends only to avoid leases for non-residence or absence for above eighty days in one year, and the statutes of 14 *Eliz. c. 11.* and 43 *Eliz. c. 9.* avoid only bonds, covenants, promises, and judgments, made or given for enjoyment of ecclesiastical livings or benefices, become void for such non-residence or absence, and not where the living, &c. became void by death, resignation, or deprivation, &c. which are voidances at common law.

Therefore, where a parson covenanted with *A.* that he should have his tithes for thirteen years absolutely, without saying, if he should so long live, and continue incumbent, and afterwards, before the expiration of the term, resigned his benefice, and so became absent or non-resident for above eighty days; and his successor, after induction, ousted *A.* of the tithes; upon which he brought an action of covenant against the first parson, who pleaded the statute of 14 *Eliz. c. 11.* in bar; it was adjudged by *Coke*, *Dodderidge*, and *Haughton*, that though this lease was void by the resignation, yet the action well lay upon the covenants in the lease; for the 13 *Eliz. c. 20.* avoids leases only where the parson becomes absent or non-resident for above eighty days in a year; and the 14 *Eliz. c. 11.* as appears by the preamble, intended only to avoid bonds, covenants, and promises made or given for the enjoyment of ecclesiastical livings, or the fruits thereof, upon pretence that they were not leases within the said statute 13 *Eliz. c. 20.* and enacts, that they shall be of such force and validity, and not otherwise, as leases by the same persons would have been, and so extends to avoidance thereof for absence, or non-residence, for above eighty days only, as the other act did the leases themselves; but this resignation was an immediate avoidance of the lease at common law, and an action thereby attached in the lessee immediately, for breach of the covenant before the avoidance, by absence or non-residence for above eighty days, by force of the statute had incurred: and these statutes did not intend to intermeddle with avoidances at the common law, but left them as they were before, and, by consequence, this resignation, which defeated the interest of the lessee at common law, was a breach of the covenant, for which the action well lay. So, they held, if the parson had died, or been deprived, &c. which would also in consequence have defeated the interest of the lessee; yet an action of covenant would have well lain against him or his executors; because the covenant was absolute, and this avoidance of his interest was an avoidance at the common law, and not by force of either of the statutes; and then at common law such lease or covenant is good, and the parson, at his peril, is to take care that the lease or covenant be made good according to his agreement; as if tenant for life covenants that another shall

Comp. Incumb. 361. 264.

3 Bulf. 202. Roll. Rep. 403. Thomas v. Rudge.

enjoy

enjoy his lands for twenty-one years, and afterwards commits a forfeiture, yet he shall be bound by his covenant.

Brownl. 125.
Wheeler and
Heydon, *per*
Haughton.

But if a parson makes a lease for thirty or forty years, if he so long live, with covenants for enjoyment thereof accordingly, this so qualifies the lease and covenant, that though his death will determine the lease, yet it will be no breach of the covenant. But as by such lease and covenant he takes upon him to do no other act whereby to avoid the lease: therefore, if he resigns, or otherwise voids the living, an action of covenant will lie against him. But if this clause were added, *viz.* "*and shall so long continue 'parson,'*" then this clause leaves him at liberty to avoid it by resignation, non-residence, or otherwise, because it qualifies the lease to continue no longer than whilst he continues parson, and in the mean time leaves it in his election how long or short a while that shall be.

Moor, 641.
Webb. v.
Hargrave.

A clerk entered into an obligation, the condition of which was, that he being presented, instituted, and inducted to a benefice then void, should, upon request of the patron, resign; and he afterwards made a lease to the patron, and then was absent for above eighty days together, whereby the lease became void; and then being requested by the patron to resign, which he refused, the patron brought an action of debt upon the bond, to which the defendant pleaded the statute of 13 *Eliz. c. 20.* & 14 *Eliz. c. 11.* and that after his induction he let the lease to his patron the plaintiff, and then was absent above eighty days together, and averred that the obligation was made for the enjoying of the benefice let by the said lease, and to the intent to compel him not to avoid the lease by absence, for fear of being required to resign, and demanded judgment, &c. upon which the plaintiff demurred; and the whole court held the plea good, and the averment to be very apt, because the obligation being made generally to resign upon request, might well be averred to be for this particular purpose, and so void.

Cro. Eliz.
88. 490.

This case fully proves, that the bonds which have been attempted and taken from parsons upon making leases, with condition that they should duly serve the cure, and not be absent from their benefice by the space of eighty days, when they appear, or can be averred to be given for security of leases made by such parsons, will be void within these statutes, and no recovery allowed thereupon. But bonds, with condition not to resign, or do any other act which should cause an avoidance at common law, though they are made for security of such leases, yet they will be good and binding, unless the parson can shew an avoidance by absence for above eighty days, and also aver that the bond was given to prevent such avoidance; for otherwise, if the lease becomes void by resignation, or other voluntary act of the parson, (except such absence for above eighty days,) the bond is presently forfeited at common law; and the statutes will no more relieve upon account of any absence after, than they would against a covenant for that purpose. But if such bonds were given, with a condition in the disjunctive, not to be absent above eighty days, nor to resign

resign or do any other act, which should cause an avoidance of the lease at common law; *quare*, whether the whole bond be absolutely void; or if it shall be good or bad, according as the avoidance first happens to be either upon these statutes or at common law?

A parson let his rectory for three years, and covenanted that the lessee should have and enjoy it during the said term, without expulsion, or any thing done or to be done by the lessor; and was also bound in an obligation to the lessee for performance of covenants; and afterwards, for not reading the articles, was *ipso facto* deprived by the statute 13 *Eliz. c. 12.* whereby the lease became void: yet it was the opinion of all the justices, that the bond was not thereby forfeited, because the lessee was not ousted by any act done by the lessor, but rather for a nonfeasance, and so out of the compass of such covenant; as if one be bound not to do any waste, permissive waste is not within the danger of it. But otherwise it would have been, if the lessor had covenanted not to omit the doing of any thing whereby the lease should become void.

4 Leon. 38.
9. pl. 104.
Degg. 123.
Comp. Incumb. 364.

So, if one be bound by obligation to make such a lease for twenty-one years, this is good, and shall bind him: but then it seems, that if this lease become afterwards void for non-residence, and the bond be put in suit, if it be averred that the bond was given for security of such lease against non-residence, this will avoid the bond also.

3 Bull. 203.
Comp. Incumb. 364.

If the parson's lessee assign over his lease to another, and the parson be absent above eighty days in a year, the lessee may also plead the statutes of 13 *Eliz. c. 20.* & 14 *Eliz. c. 11.* for the avoiding of his own assignment and agreement with the assignee; because if he assigned over no more than what the parson demised to him, such assignment must be subject to the same determination the original lease itself was; and if that be determined, he who claims under the parson, may as well shew it in avoidance of his own assignment, as the parson might in avoidance of his own lease.

Bull. 111.
Comp. Incumb. 364.

It hath been held, that if a parson makes a lease for years, which after becomes void by the statutes for non-residence, and there is an obligation for performance of covenants, although there be some covenants which do not concern the lease comprised in the indenture, yet is the bond entirely void; otherwise all the meaning of the statute would be defrauded by putting a lawful covenant into the indenture.

Cro. Eliz. 529, 30.
Lee & Ux.
v. Colehill.

Though the statutes aforesaid make void leases, bonds, &c. where the parson is non-resident, and neglects to serve the cure for above eighty days together, yet such leases or bonds, &c. are not void *ab initio*, but only from the time that such absence of eighty days shall be completed: for the words of the statute are, *shall endure no longer but while the lessor shall be ordinarily resident*, (therefore so long it shall endure,) *and serve the cure without absence above eighty days in one year; but that every such lease, immediately upon such absence, shall cease and be void*: therefore, till such absence

Comp. Incumb. 364.
Degg. 124.

sence of above eighty days be accomplished, the lease is good and in being.

Cro. Eliz.
78. Wallis
and Cox.
Cro. Eliz.
245.

Accordingly it hath been adjudged, that if such lease by indenture be made, containing covenants on the lessor and lessee's part, and after by absence for above eighty days both the lease and covenants become void; yet an action of covenant well lieth for the lessor or lessee, for any covenant broken before the end of the eighty days absence. But if the lessor was absent for above eighty days, though part of the time incurred pending the action, and before plea pleaded, yet it is a sufficient absence, and may be pleaded in avoidance of the lease.

3 Leon. 102.

Dyer, 372.
a. b.

Therefore, if in such case an action of covenant be brought, the defendant must not only plead the statutes, which make the lease and covenants void, but must also plead the performance of covenants to the time of the eighty days absence expired.

Cro. Eliz.
490. Earl of
Lincoln v.
Hoskins.

If those statutes are pleaded to avoid any action, care must be taken not only to allege the absence or non-residence fully, but also that the statutes be truly recited: therefore, where the statute of *Eliz.* was recited with this clause, *tam diu* (where the words are *tam cito*) *quam, &c. aut aliqua pars inde venerit ad aliquam possessionem, vel usum inhibitu, vel, &c.* (which words, by 14 *Eliz. c. 11.* are repealed, and appointed to be omitted,) judgment was given against the party for this misrecital, without any regard to the matter in law.

Comp. Incumb. 362.
Leon. 100.
St. John v.
Pettit.

Though the statute of 13 *Eliz. c. 20.* allow a parson or vicar that hath benefices to demise the one of them, upon which he shall not be ordinarily resident, to his curate, yet it is thought from 14 *Eliz. c. 11.* that if such curate lease the same over to another, though he himself is not absent above forty days in any one year, if the incumbent or parson be absent above eighty days in the same year, that this shall avoid the curate's lease; because 14 *Eliz. c. 11.* says, that all leases, bonds, &c. of benefices and ecclesiastical livings with cure to be made by any curate shall be of no other nor better force, validity, or continuance, than if the same had been made by the beneficed parson himself that demised or shall demise the same to any curate. Yet by *Tanfield*, when a parson leaseth to his curate, who leaseth over, the statute doth not make the lease void by any absence of the parson, but of the curate only for forty days; for otherwise, as he held, the intent of the statute might be easily frustrated, which was, that he that served the cure should be the occupier of the glebe and tithes belonging to the church, and none other: but *quere?*

Comp. Incumb. 362.

But admitting that the parson's absence for above eighty days should not avoid the curate's lease, yet we must distinguish who shall be said a sufficient curate for that purpose; and that is only one who is legally admitted by the ordinary of the place, according to the laws of the land: for otherwise he is no curate, although he serves the cure, and is resident; so that if the parson should make a lease of the glebe and tithes to such a nominal curate, yet by the parson's absence for above eighty days the lease will be avoided; and if they should be sequestered, in this case, according

according to the statute, the parson cannot plead that they are let to his curate, because he is no curate in law, and his having a cure there is an offence against the law, of which it is not reasonable that either the incumbent or curate should take advantage.

Note : It has been held, that a parsonage may be a manor ; as, if, before the statute *quia emptores terrarum*, the parson, with the patron and ordinary, had granted parcel of the glebe to divers persons to hold of the parson by divers services ; this makes the parsonage a manor : and if the same be a copyhold manor, then, notwithstanding all the statutes before rehearsed, parsons and vicars, as well as all other ecclesiastical persons, may grant copies for life, in tail, or in fee, according to the custom of the manor : for the copyholder doth not derive his estate out of the estate or interest of the lord only, but from the custom, and is said to be in by the custom, without any regard to the person of the grantor ; and these grants by copy are good without the confirmation of the patron and ordinary, and are not avoided by non-residence or death, &c. of the parson ; neither do any of the statutes aforesaid extend to rectories and tythes that are impropriated and become lay-fee, and remain in the hands of laymen, but that they may do with them as with any other inheritance, whereof they are seised. But appropriations in the hands of bishops, colleges, or other ecclesiastical persons are liable to the aforesaid statutes and rules, as other inheritances whereof they are seised : and so are impropriations, if by presentation, &c. the vicarage be restored to the church out of which it was endowed ; for by such presentation they are become for ever after presentable, and the impropriation is destroyed.

In debt upon bond to perform covenants in a lease made by the defendant, the parson, to the plaintiff, the defendant pleaded, that the lease was void by the statute of 14 *EL.*, because he was absent from his benefice above the space of eighty days ; part of which time incurred pending the action, and before the plea was pleaded. It was the opinion of the court, that the plea was good (a). But exception was taken to the pleading, because the defendant says, that the said church is a parochial church, *cum curâ animarum*, but does not say, that it was so at the time of the lease and obligation made ; for it may be, that at the time of the lease there was a vicar, and then it was not *cum curâ animarum*. And upon that exception judgment was given for the plaintiff.

3 Leon. 102. Coxe's case. [(a) As the full statute time had not incurred at the commencement of the action, and the statute could therefore not then attach, this plea would now, it seems, be adjudged bad upon that ground. Evans v. Proffer, 3 Term Rep. 188. Whether, at law, a clergyman may plead his non-residence in order to discharge himself of the obligation of his contract, is a point which doth not appear to have been yet judicially determined. Whether, in equity, he shall come forward as plaintiff, and insist upon the breach of a positive law, and a neglect of his pastoral duties, in avoidance of an agreement fairly entered into, is a point, one would think, too clear to admit of a doubt. And yet an attempt of this kind was not long ago made by Mr. Wm. Atkinson, the parson of Hillington in Norfolk, who filed a bill in the Exchequer for an account of tythes, and to set aside a composition he had entered into with his parishioners, (among whom was his patron,) upon the ground that such composition was void, because, in the words of his bill, "he was absent from Hillington and without being resident therein or serving the said cure for above four-score days in one year after the signing of the agreement of the 14th of October 1784;" (the composition he had entered into with his parishioners;) "and that he was absent above four-score days in 1785, and before the 10th of October in that year, and had not any other benefice during all that time." His bill was dismissed with costs. Atkinson Clk. v. Sir Martin Browne Folkes, and others, July 13, 1792.]

Godb. 29.
Pl 3^d.
Marrow's
case.

Debt upon a bond with condition to pay such a sum, the defendant pleads the statute 14 *Eliz. c. 11.* that all covenants, bonds, &c. made for the enjoying of leases made of spiritual livings by parsons, &c. should be void, and avers that his bond was made for the enjoying of such a lease. But, because the condition was expressly for payment of money, the justices held it clear law, that the bond was good, and out of the statute: and so by this case it appears, that such averment will not hold good against an express condition to another purpose. And this differs from *Hargrave* and *Webb's* case, which was only to resign generally on request, and therefore might well and consistently be averred to be to the intent to compel him not to avoid the lease by absence, for fear of being required to resign.

(G) Of the Consent or Confirmation of others to Leases made by Ecclesiastical Persons: And herein,

1. Where Confirmation is necessary either in respect of the Leases or Estates made, or of the Persons making the same.

Comp. In-
cumb. 366.
Co. Lit. 44,
45.

AS to this it is to be observed, that no confirmation whatever of any lease or estate made by ecclesiastical persons not conformable to the eight rules or qualities before-mentioned, will bind the successor, except only in the case of the concurrent lease: for that not being construed to be within the restraint either of the 1 *Eliz. c. 19.* or 13 *Eliz. c. 10.* remains as it did before at common law; and as at common law confirmation was necessary to make such lease good against the successor, not being warranted by 32 *H. 8. c. 28.* (unless the old lease were surrendered or expired within one year after the making of the new lease), so it is still, and with confirmation will bind the successor. This therefore seems to be the chief, if not the only use of confirmation, as to any persons allowed to make leases within 32 *H. 8. c. 28.* But there appears this difference between concurrent leases made by archbishops or bishops upon the 1 *Eliz. c. 19.* and concurrent leases made by other ecclesiastical persons on the 13 *Eliz. c. 10.*: for upon the 1 *Eliz. c. 19.* the concurrent lease is not restrained to any certain time before the expiration of the first lease, but may be made three, four, five years, or more, before the expiration thereof, so that both leases in the whole do not exceed twenty-one years, upon the construction before taken notice of, that the second lease is void, or at least good by estoppel only, for so many years as are then to come of the first lease: but concurrent leases to be made by any of the ecclesiastical persons within the restraint of 13 *Eliz. c. 10.* will not be good to bind the successor, unless the former lease for years be surrendered or expired within three years next after the making of such new lease: and this is expressly provided for, not by the 13 *Eliz. c. 10.* but by the 18 *Eliz. c. 11.* as hath already been shewn.

3 Co. 75.
10 Co. 60. a.

We are next to consider where confirmation was necessary at the common law, and where it continues so at this day, in respect of

of the persons making any leases or grants of their ecclesiastical possessions. The persons who were restrained by the common law from making any leases, grants, or estates, to bind their successors without confirmation, were only sole corporations, as bishops, abbots, deans, parsons, vicars, prebendaries, and such like; for corporations aggregate might make what leases they pleased, without confirmation of any other persons whatsoever; but the prudence of the common law never thought fit to trust such sole corporations with any alienation or disposition of their possessions to bind their successors, without the concurrence and confirmation of other persons. And though bishops and abbots were construed to have the whole estate and right of the land in themselves, which parsons, vicars, prebendaries, and such like, had not, yet as to the binding their successors they had no more power than the others, without the concurrence and confirmation of the persons substituted and appointed by law for that purpose.

And where such sole corporations make any concurrent lease upon the statutes before-mentioned, the law continues the same at this day, and they must be confirmed in the same manner as any other leases or estates made by the same persons must have been at the common law.

Comp. Incumb. 366.
Co. Lit. 44.

So also parsons, vicars, &c. can make no lease at this day, though it be with conformity to the eight rules before-mentioned, to bind their successors, without confirmation of the same persons who by common law were required to confirm all leases, grants, or estates made by them; for they are expressly excepted out of 32 H. 8. c. 28. and, consequently, continued as they were at common law till 13 Eliz. c. 10. imposed a total restraint on them, as well as all other ecclesiastical persons, to make leases to bind their successors for any longer term than twenty-one years, or three lives. And though by that statute they are left at liberty, as well as other ecclesiastical persons, to make such leases, yet having no ability by 32 H. 8. c. 28. to make them solely, as other sole corporations had; therefore, to make good even such leases against their successors, they must have the confirmation of the same persons, and in the same manner, as they must have had at the common law before the making of any of those statutes.

Co. Lit. 44.
b. Cro. Eliz.
18. Comp.
Incumb.
367.

The grants of ancient offices belonging to ecclesiastical persons are not within any of the statutes before-mentioned, but remain as they did at common law, and therefore may be granted with the ancient fee: but then all such grants must be confirmed to bind the successor, because they must have been so at the common law.

10 Co. 63.
Vide tit.
Offices.

2. What Persons are to confirm such Leases or Estates, and in what Manner.

As to the persons who are to confirm such leases or estates, we must take notice that this varies according to the nature of the persons who make such leases, and the nature of the title of the persons who are to confirm the same.

[It is said by Jones, J. in argument, that a recusant though

disabled to present, shall yet be patron to confirm the lease of the incumbent. Sir W. Jones, 22.]

Co. Lit.
300. b.
Iro. tit.
Leases 64.
Co. 153.
11 Co. 19.
b.

Therefore, if a parson makes a lease for three lives, or twenty-one years, or less, observing the rule before-mentioned, this is to be confirmed only by the patron and ordinary, and no confirmation of the dean and chapter is required thereto; for they have nothing to do with that which the bishop doth, as ordinary, in the lifetime of the bishop.

B. o. tit.
Leases 64.
Co. Lit.
300. b.

But if the bishop be patron of the church in right of his bishoprick and also ordinary, then the dean and chapter ought likewise to confirm all leases made by the parson, because in such case the advowson of the church is parcel of the bishoprick, which cannot be charged to bind the successor without the concurrence and confirmation of the dean and chapter; and how far the successor of the parson will be bound in such case, will appear hereafter.

Dyer, 239.
Benl. 80.
Hodges v.
Tucker.

So, where a priest in the cathedral church of *Wells* being parson imparsonnee of the church of *W.* made a lease by indenture for 100 years before 13 *Eliz. c. 10.* rendering rent to him and his successors; and this was confirmed by the dean and chapter only, without any confirmation of the bishop, who was patron and ordinary; then the parson died, and his successor accepted the rent, and after, before 13 *Eliz. c. 10.* made a lease for forty years, which was confirmed by the bishop, dean, and chapter; it was adjudged, that the first lease was *ipso facto* void and determined by the death of the parson who made it, so that no acceptance of the rent by the successor after could make it good, for want of the patron and ordinary's consent.

Dyer, 61. b.
166. b.
240. a.
Plow. 509.
Roll. Abr.
481.
Co. Lit.
300. b.

So, where a prebendary in a cathedral church, or an archdeacon, made a lease for years of parcel of their possessions, to which confirmation was requisite, and this was confirmed only by the dean and chapter, without any confirmation of the bishop; it was held, this lease should not bind the succeeding prebendary or archdeacon, because the bishop is patron and ordinary of every prebend, and may be so of an archdeaconry; and therefore, to make good leases by them against their successors, the bishop's confirmation ought likewise to be had, as well as the dean and chapter's.

Dyer, 356.
2 b.
Le n. 235.
Co. Lit.
319.
Roll. Abr.
479.
2 Bull. 200.
21 H. 6. 9.

But upon the books there seems a manifest diversity between the confirmation of the bishop, as patron and ordinary, without confirmation likewise of the dean and chapter, and their confirmation without the bishop's; as also between the resignation, deprivation, or translation, and the death of the bishop, who so alone confirmed as patron or ordinary: for if any dean, archdeacon, prebendary, parson, or vicar, had made any lease for years at the common law, or should make such lease at this day, whereto confirmation is requisite, and the bishop, as patron and ordinary, confirms such lease, without any confirmation of the dean and chapter, and then the dean, archdeacon, prebendary, parson, or vicar dies, or is removed, and the bishop collates another as patron and ordinary; yet cannot such incumbent avoid the first lease, though it was not confirmed by the dean and chapter, because he came in purely by the collation of the bishop, as patron and ordinary, without any aid or concurrence from the dean and chapter; and therefore, as *Littleton* says, ought to hold himself content, and

Lit. § 548.
Co. lit.
343. b.

agree to that which his patron and ordinary have done, for he comes in subsequent to such charge: but, as appears by the cases before put, the confirmation of the dean and chapter alone, without the bishop's confirmation likewise, will not be effectual to bind the succeeding archdeacon, prebendary, parson, vicar, &c., because he derives no title under them, nor comes in with their assent or concurrence; for they have nothing to do with the collation of any person, but the bishop does it absolutely, and in virtue of his own power as patron and ordinary; and therefore if such leases want his confirmation, those who come under him may avoid them, notwithstanding any confirmation of the dean and chapter, under whom they derive no title: but because such advowson or right of collation is also parcel of the possessions of the bishoprick, and to bind the succeeding *bishop*, the confirmation of the dean and chapter is requisite; as in all other cases where the bishop, who is a sole corporation, makes any disposition of the possessions of his bishoprick: therefore without such confirmation of the dean and chapter, the succeeding bishop, or his incumbent, shall avoid such lease. But here another diversity arises between the translation, resignation, or deprivation of the bishop, and his death. In the first case it is held, that the leases confirmed by him alone, without the confirmation of the dean and chapter, will bind the succeeding bishop, and his incumbent, during his life; but in case of such bishop's death, such leases so confirmed by him alone, as patron and ordinary, will not bind the succeeding bishop or his incumbent: and a diversity is taken where a bishop, &c. makes any estate, lease, grant of a rent-charge, warranty, or any other act which may tend to the diminution of the revenues, which should maintain the successor, there, the resignation, deprivation, or translation of the bishop, &c. is all one with his death; but where the bishop is patron and ordinary, and confirmeth a lease made by the parson without the dean and chapter, and after the parson dieth, and the bishop collateth another, and then is deprived, translated, or resigns, yet his confirmation remaineth good; for, says my lord *Coke*, the revenues that are to maintain the successor are not thereby diminished. But this seems a very precarious reason; and a better reason of the diversity seems to be this; that when the bishop, as patron and ordinary, has by deed under his hand and seal subscribed his confirmation of the lease, this ought to be binding upon him, at least during his own life; and therefore though he be afterwards translated, deprived, or resigns, yet, since these are either by his own immediate acts, or occasioned by his default, it is not reasonable they should be allowed to avoid or derogate from his own acts, which otherwise would have bound during his life; for the law never permits any to avoid or derogate from his own acts: but these reasons have no place after the bishop's death, for then his confirmation is at an end, and can be no longer binding on his successor, since he had no power to charge the possessions of the bishoprick any longer than during his own life, without concurrence and confirmation of the dean and chapter, who are by law substituted and appointed to that purpose.

Dyer, 106.
b. 221. b.
Plow. 528.
Bro. tit.
Leases, 64.
tit. Confirmation, 21. 30.

But yet it is most advisable to have the confirmation likewise of the dean and chapter upon such leases made, and in several books their confirmation is either pleaded or admitted, since without it the lease cannot bind any longer than during the bishop's life who so confirmed it.

In some cases the confirmation of the patron is necessary, and in some not: wherein this diversity is taken in the books, that such sole corporations, as have not the absolute fee and inheritance in them, as prebendaries, parsons, vicars, and such like, if they make any leases or estates, there, to bind their successors, the patron must confirm the same; but such sole corporations as have the whole estate and right in them, as bishops, abbots, &c., or such corporations aggregate as have the whole fee and inheritance in them, as dean and chapter, master, fellows, and scholars of any college, hospital, &c., these may make leases to bind their successors, without any confirmation of the patron or founder, though the bishop, abbot, dean, master, &c. were presentable; and the reason of this diversity appears in the nature of the right with which each is invested.

Roll. Abr.
481.
Dyer, 273.

But if a parsonage or vicarage be a donative, then the confirmation of the patron alone is sufficient to all leases, &c. made by the parson or vicar, and shall bind the successor without the confirmation of any other.

Co. Lit.
300. b.
Comp. Incumb. 372.

If there be a patron paramount, as well as an immediate patron, confirmation of the immediate patron, without the other's confirmation, is not good: as, if a parson be patron of the vicarage of the same church, and the vicar make a lease, confirmed by the parson and ordinary, this is not good without the confirmation of the patron of the rectory also, because both have an interest in the possessions of the vicarage.

2 Roll. Abr.
479.
Leigh and Hallier.
Cro. Eliz.
587.
Dr. Herbert and Munday.
Sid. 57.
Keb. 280.
Gie and Rider.

If the bishop of *A.* be patron of the church presentative of *B.*, which lies within his diocese, and this be the corps of a prebend in the church of *A.*, and the bishop of *A.* be also patron of the church of *C.*, which is also presentative, and lies in the diocese of the church of *D.*, and afterwards the church of *C.* be lawfully annexed and united by the assent of the bishops, deans, and chapters of both dioceses, to the said prebend of *B.*, and afterwards the bishop of *A.* collate *J. S.* to the said prebend, which now by the union consists of both churches, and instal him in the cathedral church of *A.*, and then the prebendary make a lease for years, which is confirmed by the bishop, dean, and chapter of *A.*, and not by the bishop of *B.*, yet this is a good confirmation; for by the union the bishop of *D.* hath annexed the church of *C.* to the prebend of *B.*, and so hath deprived himself of the power of confirmation as ordinary; for after the union, the prebendary is invested in both churches by his instalment, without any presentment, admission, institution, or induction to the church of *B.* or *C.*

Comp. Incumb. 370.

If the dean of any cathedral church make a lease or grant of any of his possessions, whereof he is sole seised, to bind his successors, and confirmation be necessary thereto; this must be confirmed by the bishop and chapter of the same church, and not by the king,

king, although he be the patron of such deanery ; because, as hath been said, the dean and chapter have the whole fee and inheritance in themselves, and then the patron's concurrence or confirmation is not necessary. But it seems to be a doubt, whether the confirmation of the bishop be necessary to such grant or lease ; and several books seem to hold, that the confirmation of the chapter alone, without the bishop, is sufficient to make good the dean's leases or grants that need confirmation. But yet it is laid down as a rule in the *Parson's Counsellor*, that the bishop's confirmation, as well as the chapter's, is necessary to all leases and grants made by the dean ; and what is said by *Fitz.* that the bishop and chapter are in law looked upon but as one body, seems also to favour this opinion ; for it is reasonable that the whole body should consent to the granting of their possessions, and not that the bishop, who is the head of the body, should be unconcerned therein : also, the possessions of the dean are said to be derived from and carved out of the bishoprick, and the bishop *de jure*, is said to be patron of the deanery, which are all strong arguments to prove the bishop's confirmation necessary, though no book case can be found expressly to warrant it, but rather the contrary, as appears by the cases first cited, wherein no notice is taken of the bishop's confirmation, or that it was necessary ; *ideo quare ?*

But if such deanery be merely donative, then the king's consent and confirmation, as patron, must be obtained, and that without the bishop's confirmation is sufficient, as in all other donatives, wherewith the bishop has nothing to do.

The dean of *Wells* might anciently have passed his possessions belonging to his deanery, with the assent of the chapter, without the bishop's confirmation ; afterwards, the deanery was surrendered by the dean thereof, with all the possessions thereunto belonging, and so dissolved by act of parliament ; the dissolution was confirmed, and a new deanery erected, and the nomination of a new dean, and his successors, given by the act to the king and his successors ; and it was thereby also enacted, that the dean and his successors might demise, grant, or part with any of their possessions, in the same manner and form as the ancient deans might and used to do : in this case, if the new dean make any lease or grant of any of his possessions, the bishop's confirmation was not necessary thereto, but only the chapter's, because that alone was sufficient before ; neither is the confirmation of the king requisite, because this is not a mere donative of the king, though he hath the nomination of the dean ; and by the statute the new deanery is made of the same nature as the old one was, which could not be a donative, because the dean and chapter might, without the consent or confirmation of any others, have passed away their possessions.

It has already been shewn, that all leases or grants made by archbishops or bishops, whereto confirmation is necessary, are to be confirmed by the dean and chapter ; for the law, not thinking fit to trust the bishop alone with the disposition of his possessions to bind his successors, did for that reason (amongst others) consti-

Dyer, 40. b.
273. a. b.
349. pl. 18.
Plow. 538.
Roll. Abr.
478. 481.
Degg. 120.
F.N.B. 194.

3 Co. 75. b.
17 E. 3. 40.
Regist. Orig.
230.

Comp. Incumb. 371.

Dyer, 173.
Walshound
and Pallard.
Roll. Abr.
478. 481.

3 Co. 75.
10 Co. 60. a.
2 Co. 39.
6 Co. 34. b.

tute the dean and chapter to give their consent and confirmations to all leases or grants made by him for that purpose.

Dyer, 58. a.
b. 282. b.
Noy, 94.
Co. Lit. 301.
Roll. Abr.
477.
Leon. 234.
50 E. 3.
Statham,
tit. Assise,
Bishop of
Litchfield
and Coven-
try's case.
12 Co. 71.
Litch. 237.

But if a bishop hath two chapters, and makes a lease of any of the possessions of the bishoprick, whereto confirmation is necessary, and this is confirmed only by one dean and chapter, this will not bind the successor of the bishop; for both are but one in respect of the bishop, if the bishop is chosen by both. So it is, if a bishop be patron of an advowson in right of his bishoprick, and collate a clerk, who makes a lease for years, and the bishop and one dean and chapter only confirm it; this will not bind the succeeding clerk of the succeeding bishop, for want of confirmation by the other dean and chapter. But though both deans and chapters have used to confirm such leases, yet if one dean and chapter have surrendered their possessions to the king, and then the bishop or his clerk make a lease, whereto confirmation is necessary, and this is confirmed by the remaining dean and chapter only; this is good, and shall bind the successor; because by the surrender the one dean and chapter is dissolved, and are as if they never had been: and although after such surrender, the dean and chapter, who so surrendered, were again created, yet confirmation by the other would be sufficient; as was held by the greater part of the justices in *Ireland*, and by five justices in *England*, who certified their opinion to be so into *Ireland*.

12 Co. 71.

If two bishopricks, that were originally distinct, are by lawful authority united, and the usage hath been since the union, that the several deans and chapters have made confirmations severally, viz. each dean and chapter of the leases or grants of the possessions of their respective bishoprick, but the charter of union is not extant, or cannot be found; such several confirmation is good; because it shall be intended, by reason of the usage, that the union was made spiritually, and in such a manner, that, notwithstanding the same, all leases and grants should severally be confirmed as they were before the union: and this, either to prevent confusion, or by reason of the remoteness of the several deaneries; and then *modus & conventio vincunt legem*, and such confirmation by the dean and chapter, of their own original possessions, is good. *Secus*, if the union were made generally, for then both ought to confirm.

Dav. 1.
Roll. Abr.
477.

If a bishop hath no dean and chapter, then his grants are to be confirmed by the clergy of his diocese, where confirmation is necessary; for the law will not trust any sole corporation with the disposition of his possessions, as hath been before observed.

Comp. In-
cumb. 267.

Whenever a dean and chapter are to confirm any lease or grant, the dean himself must join with the chapter, and confirmation by his subdean, deputy, or proctor, will not be sufficient: for they have no power to charge the possessions of the church, neither is any stranger capable of being a dean-substitute or proctor, but only one of the chapter.

11 H. 4. 84.
Pro. tit. Cor-
poration, 17.
Dav. 47.
Fa. 461.
Litch. 237.

Therefore, where upon a composition for tithes a parson granted an annuity to the abbey of *Battel*, and this grant was confirmed by the bishop, dean, and chapter, being patrons; but in the deed of confirmation it appeared that the dean was absent, and did not

put

put his seal thereto, but that the chanter, who was his commissary, did it for him; it was held, that though the dean might have a commissary or deputy to exercise his spiritual jurisdiction, yet that such deputy or commissary cannot charge the possessions of the church.

A lease was made by the free chapel and college of *Windsor* under the common seal, but the dean or warden himself was not party to the lease, but one who was his deputy in his absence; and upon a suit in Chancery, to set aside the lease, a statute of the college was shewn for the authority of the deputy to exercise and perform the office of dean in all things *in person. & collegium, &c.* yet the judges held, that the confirmation by the deputy was not good, for that he had no authority to confirm this lease by the college statute provided; for that by the word *collegium*, all the possessions of the college were not to be understood, but only the site and circuit of the college, or place of its situation. Which case seems to prove, that if by the statutes of a church or college, the deputy-dean may confirm grants and join in the making of leases, as if the dean himself was present and joined therein, that then such confirmation will be good; for the founder or patron may make what law he pleases for the regulation of the corporation, and when he has invested the deputy-dean with such power, this has the same function with any other laws for the regulation of that corporation.

As a deputy-dean, generally speaking, cannot confirm leases, so neither can he who is but a mere commendatory dean, *viz.* a dean by *recipere in commendam*; for though he may take the profits, because that was one end of his having the deanery *in commendam*, and may, with the chapter, choose a bishop, and also exercise spiritual jurisdiction, and sue or be sued by that name, because those acts are of necessity, and for the advantage of the deanery; yet cannot he confirm leases, for this is merely a voluntary act, and such commendatory dean is but *depositarius*, and not a dean complete. But if a dean be elected bishop, and before his consecration obtain a dispensation to hold his deanery *in commendam*, such dean may well confirm leases, *&c.* and if he be translated to another bishoprick, and after his election, and before consecration, obtain a dispensation to hold the same deanery *in commendam* with his second bishoprick, his old title remains; and confirmations, and other acts done by him as dean, are as good in law as if he had never been made bishop: for there is a great difference between a *recipere in commendam*, and *retinere in commendam*; the one comes in purely by virtue of the dispensation, and has no other title; the other comes in legally at first as dean, and by virtue of the dispensation is only enabled to continue so still; for that gives him no original new title, as in the other case, and therefore he is as much dean as he was before. And the same distinction holds between *recipere* and *retinere in commendam*, in case of bishops; for a mere commendatory bishop in the *recipere* cannot confirm leases, *&c.* but in such case the archbishop is to do it. Also, the guardian of the spiritualities cannot confirm

Dyer, 233. b.
Comp. In-
cumb. 308.
Litch. 251.
Palm. 480.

Noy, 94.
Palm. 460.
480.
Litch. 237.
250.
Jon. 158.
&c.

firm leases; for such confirmation, being a mere voluntary act, and being to transfer a right to another, none are capable of it but those who have the estate and right in themselves, which such commendators in the *recipere*, substitutes, rectors, deputies, and guardians of the spiritualties have not.

Where there is a mere commendatory dean in the *recipere*; *Quære*, whether the bishop's leases and grants are not to be confirmed by the clergy of the diocese, in case where there is no dean and chapter, or by whom else?

Comp. In-
cumb. 368.

All leases or grants, which need confirmation of a dean and chapter, are to be confirmed by the dean and major part of the corporation, and being so confirmed are good, though several of the particular members dissent, or are not present; for the dean and major part of the chapter make the corporation, and the others have no negative voice to hinder such majority from doing any corporate act; for otherwise, by the corruption or perverseness of one or two members, the whole corporation might suffer; and that this was the law, appears by the following act of parliament:

33 H. 8.
c. 27.

“ Albeit that by the common laws of this realm of *England*,
“ all assents, elections, grants, and leases, had, made, and grant-
“ ed, by the dean, warden, provost, master, president, or other
“ governor of any cathedral church, hospital, college, or other cor-
“ poration, by whatsoever name they be incorporated or founded,
“ with the assent and consent of the more or greater part of their
“ chapter, fellows, or brethren of such corporation, having
“ voices of assent thereunto, be as good and effectual in the law,
“ to the grantees or lessees of the same, as if the residue of the
“ whole number of such chapter, fellows, and brethren of such
“ corporation, having voices of assent had thereunto consented
“ and agreed; yet the said common law notwithstanding, divers
“ founders of such deaneries, hospitals, colleges, and cor-
“ porations within the said realm, have, upon the foundations
“ and establishment of the same deaneries, hospitals, colleges,
“ and other corporations, established and made, amongst other
“ their peculiar acts, local statutes, and ordinances, that if any
“ one of such corporation, having power and authority to assent
“ or dissent, should and would deny any such grant or grants,
“ that then no such lease, election, or grant, should be had, or leased,
“ or granted; and for the performance of the same have been, and
“ be daily thereunto sworn; and so the residue may not proceed
“ to the perfection of such elections, grants, and leases, accord-
“ ing to the course of the common laws of this realm, unless
“ they should incur the danger of perjury; for the avoiding
“ whereof, and for the due execution of the common law uni-
“ versally within this realm, and every place, in one conformity
“ of reason to be used, be it ordained, established, and enacted, by
“ the authority of this present parliament, That all and every par-
“ ticular act, order, rule, and statute, heretofore made, or hereafter
“ to be made, by any founder or founders of any hospital, col-
“ lege, deanery, or corporation, at or upon the foundation of any
“ such hospital, college, deanery, or corporation, whereby the grant,
“ lease,

“ lease, gift, or election, of the governor or ruler of such hospital, college, deanery, or corporation, as have or shall have voice or assent to the same, at the time of such grant, lease, gift, or election, hereafter to be made, should be in anywise hindred, or let, by any one or more, being the lesser number of such corporation, contrary to the form, order, and course of the common law of this realm of *England*, shall be from henceforth clearly frustrate, void, and of none effect, with an abrogation of all oaths heretofore taken to such effect, and a penalty of 5*l.* on any person who shall for the future give such oath.”

When the dean and chapter are to confirm any lease, there ought not only to be a majority of them, but they ought also to be personally present, and *capitulariter congregati* in one place; which, with other circumstances relating to the manner of their confirmation, will appear by the following case, which was thus :

The bishop of *Fernes* makes a lease for years; the chapter, consisting of eleven persons, *viz.* the dean and ten prebendaries, confirm it in this manner, *viz.* The dean makes one *J. S.*, a mere layman, his proctor or substitute, to give his assent to all leases or grants; this proctor, and three of the prebendaries only meet together, and fix the chapter seal to the confirmation of this lease, which confirmation was made in the name of the dean and chapter; after that, three others of the prebendaries, at several days, by themselves, subscribe their names to the said confirmation; and after the death of the bishop, his successor enters upon the lessee: it was adjudged lawful; for that the lease was void after the death of the bishop who made it, for want of confirmation; 1. Because no confirmation was made by the dean himself, but only by the proctor, which was not sufficient; for he was merely a stranger to the chapter, and not capable of such procuration; and therefore all he did was void both by the canon and common law; for in the canon law the rule is, *absens non potest demandare votum suum, nisi uni de capitulo*; and there is another rule, *oportet quod procurator semper institutus sit de collegio*; and another, *votum dari non potest per literas*: and agreeable to this is the rule of the common law; for in the parliament the peers may give their vote by procurator or proxy, but their proctors must be barons, and members of the same house; and a stranger is not capable of being a proxy; and admitting he were, yet where a corporation passes any interest, the members thereof cannot give their assent by proctors or substitutes; and so the doubt in *Dyer* seems to be resolved.

Dav. 42, 43.
&c. dean and
chapter of
Fernes's
case.
Dyer, 145.
Roll. Abr.
479.

2. It was adjudged, that though the deed of a corporation needs no delivery, as the deed of a natural person does, but that the fixing of the corporation seal gives perfection to it, yet the major part of the corporation ought to be present when the seal is so affixed; for the major part of the chapter make the corporation, and their act is the act of the corporation, though the others do not agree; but here was only the proctor of the dean and three of the chapter present when the seal was affixed,

Dav. 47, 48.
&c.
2 Roll. Abr.
23.
Show. Par.
Cases, 29.

affixed, which is not sufficient; for there ought then to be a majority present, otherwise it may be said to be *cum assensu*, but not *consensu*, and it ought to be *cum assensu & consensu* of the dean and chapter: for as a body natural cannot do any perfect act, if it be dismembered, the head in one place, and the hands in another; so neither can a body politick: and therefore they ought to be *capitulariter congregati* in a certain place. But it was agreed, that they are not confined to meet in their chapter-house, but may meet at any other place: but at such meeting and sealing there ought to be a majority then present; for if they set their names at several times, and in several places, after, this makes it not to be the act of the corporation, but *factum singulorum* in their singular and private capacity, and so shall not bind. It was also held, that the major part of the members being assembled, ought to give their voices and consents singly and distinctly, as in the choice of knights of the shire, and not in a confused and uncertain manner; and when the major part so consent, their consent ought to be expressed by their fixing of the seal to the deed of confirmation or other grant.

Dyer, 282.
b. in margin.

The corporation of the mayor, bailiffs, and burgesses of *Windfor* made a lease for years, one bailiff only assenting; and this was held a void lease, if there were two bailiffs; but as to the burgesses, it was held, that if the greater part of them assented, this would be sufficient, though they were not present at the sealing, if their assent was had before: but *quære*; for the foregoing case seems to be an authority that there must be a majority present at the time of the sealing; for that is the act which expresses their consent; and unless there be a majority then present, no assent at any other time can make that good, which, for want of a majority, was void when it was done. But in that case it appears, that the consent of the majority was not had till after the sealing; whereas in this case the consent of the majority was before the sealing, though such majority was not present at the sealing; and therefore *quære*, if this makes any difference?

Dyer, 40.
Chafin's case.
Plow. 199.
Roll. Abr. 478.
8 H. 7. 7, 8.
2 Leon, 176.
4 Leon, 11.
Clerk's case.
Bro. tit. Confirmation, 30. tit. Fairs (45).
Co. Lit. 300, 346.
Gedeb. 210.
Ireland and Barker.

But here a material difference is to be observed between a real interest and a bare authority or power only, as to the manner of concurring in such leases. For if a dean be seised of lands in right of him and his chapter, or master or warden of an hospital or college in right of himself and the brothers and sisters or fellows of the same college, or a mayor in right of himself and the commonalty, and the dean, master, warden, or mayor, make a lease by indenture between the dean and chapter, master or warden, and the brothers and sisters or fellows of the same hospital or college, or between the mayor and commonalty of the one part, and *J. S.* of the other, whereby the dean with the assent and consent of the chapter, or the master with the assent of the brothers and sisters, or the warden with the assent of the fellows and scholars, or the mayor with the assent of the commonalty, lease such lands to *J. S.*, and with such assent or consent put thereto their common seal; this is a void lease; for the chapter, brothers and sisters, fellows and scholars, or commonalty, are equally

equally seised, and have an equal right and interest in the lands with the dean, master, warden, or mayor, and therefore ought to join in the leasing or granting part of the deed, and not only to give their assent, for they all make but one person in law; and a body cannot be distinct, so as that one part may assent to the acts of the other. But if the dean were sole seised of the lands in right of his deanery, the master or warden in right of their master or wardenship, or the mayor in right of his mayoralty, then the lease of the dean, master, warden, or mayor alone, with the assent and consent of the other persons before-mentioned, is sufficient; because the dean, master, warden, or mayor only are seised and have a real interest, and the other persons before-mentioned have no interest at all, but only a bare right or power of assenting to the leases or grants of their respective heads, and therefore their assent or consent is sufficient, without joining in the leasing or granting part. So, if an abbot or prior be seised of lands in right of the abbey or priory, yet, because the monks are all dead persons in law, and not capable of having any lands, of being empleaded, and such like acts; therefore, though they, together with the abbot or prior, constitute and make up but one body, yet the abbot or prior only have the power of leasing, and the assent or consent of the convent must be had and expressed by affixing their common seal, in the same manner as where the chapter, having no interest in their own right, are to assent to the leases of their dean. So likewise, where a parson makes a lease for years, he only is to grant or lease the lands, and the patron and ordinary are only to give their consent by affixing their respective seals, and expressing their consent or assent in the body of the deed; for the parson is the principal grantor, and the others have not any real interest in the lands, though the law has thought fit to require their assent to all leases or estates to be made by the parson.

A dean, seised of lands in right of him and his chapter, made a lease for years; the chapter confirmed this lease by a distinct deed; and it was held not good, because their deeds being severed cannot operate at all, since they are but one entire body, and therefore cannot sever in their acts. But if after such lease they had all joined in a confirmation, this had amounted to a new lease, and been good as to the joint act of them all, as the original lease itself would have been, if all had joined in the leasing part.

A lease for years was made in this manner; *propositus, socii & scholares Collegii Reginalis in Oxonia*, guardianus hospitalis, &c. and exception taken, that it ought to have been *guardiani*, in the plural number, for the college consists of many persons, and each of them is capable, and therefore not like an abbot or convent: but *per curiam* it was held good, for the college is but one body, and as one person, and therefore *guardianus* is sufficient to describe it by.

As a patron may confirm explicitly by his deed or writing, so may he also confirm by consequence of law: for if a parson makes

Dyer, 40. l.
in margin.

1 Leon. 134.
4 Leon. 85.
Provost of
Queen's
College,
Oxon.

5 Co. 15.
Newcomb's
case, Cro.

Car. 38.
Roll. Rep.
361.
Co. Lit.
301.
Roll. Abr.
481.

makes a lease for years to the patron, who grants or assigns it over to another, this amounts to a confirmation in law by the patron, because confirmation being nothing but an assent under the hand and seal of the party confirming, such assent in this case sufficiently appears by his assigning over the lease to another. But without such assignment, the ordinary's confirmation will not make good the lease to the patron to bind the successor, because in the acceptance of the lease the patron was only passive, and executed nothing under his hand and seal which could amount to a confirmation, as in the other case, where he makes an actual assignment over. But in case of such confirmation in law, the patron ought to be absolutely seised of the advowson; otherwise it will bind only according to the estate he hath therein, as will appear hereafter. But *quare*, if the assignment in this case were without writing, if that would be good, or could amount to a confirmation?

Dyer, 52.
338.
Cro. Eliz.
447. 472.
5 Co. 81.
Co. Lit.
297.
Moor, 479.
481.
Co. Lit.
300.
Bendl. 238.
And. 47.
Hetley, 75.

Another difference observable in the manner of confirming such leases as we are treating of is, as to their duration or continuance. For if a parson makes a lease for twenty-one years at this day, and the patron and ordinary confirm his estate therein for seven years, or, reciting the lease, confirm *dimissionem predictam, & etiam indenturam eidem scripto confirmationis annexam, & omnia in eadem content., quoad septem annos solummodo, & non ultra*, yet is the estate or lease well confirmed for the twenty-one years; for when they confirm the estate of the lessee, that is entire, and cannot be divided. So, where a prebendary made a lease of a rectory, parcel of his prebend, for seventy years, before the statutes, and the bishop, reciting the demise, confirmed the *said demise or lease* for fifty years, and no more, and the dean and chapter likewise confirmed the same in the same manner, it was held by all the justices, that they might confirm severally, and that their confirmation was extendible to the whole seventy years; for when they confirm *dimissionem predictam*, they confirm that demise or lease, which comprehends and includes the whole term of seventy years, and then the words *pro termino* fifty only, & *non ultra*, come too late, and are repugnant to the confirmation of *dimissionem predictam*, which included the whole term of seventy years. But it was agreed, that if after such recital of the demise they had confirmed the *land* to the lessee for fifty years only, this had been a good confirmation for fifty years only, and no such repugnancy in the confirmation: and so, if the demise had been of thirty acres, they might have confirmed the lease as to one or more acres, or might have confirmed all, or part, on condition. And a diversity was taken between a bare assent without any right or interest, and an assent coupled with a right or interest; for the termor, who is to perfect an act by his attornment, cannot assent for a time, nor upon condition, nor for part of the thing granted, but it shall enure absolutely to all, because he having but a bare right cannot qualify or apportion it; but the bishop, who is patron, and the dean and chapter, have an interest in the parsonage or prebend, and every part of it; for the patron hath *jus conferendi*;
and

Cro. Eliz.
79.
21 H. 7. 41.
F.N.B. 49.
Co. Lit.
343. b.

and a release to the patron of an annuity in the time of vacation is good, and the patron and ordinary may charge the glebe in the time of vacation, and therefore having an assent clothed with an interest may qualify it as they please. Another difference was taken in the cases before-mentioned between a lease for years and an estate of freehold or inheritance. For if a parson or prebendary make a lease for years, confirmation may be made of the *land*, as has been said, for a less number of *years*, or of the *lease* for a less number of *acres*; for the years or acres are several, although the lease or term, or land are one; so that if a lease be made for five years, rendering 20*l.* *per annum* rent, the years are several, so that an action of debt will lie for the rent every year. But if a parson or prebendary before the statutes had made a lease for life, a gift in tail, or a feoffment in fee, and confirmation had been made of the *land* to the lessee, donee, or feoffee for an hour, this would be good for ever; for the freehold or inheritance passing by one and the same livery, is entire, and then the confirmation, which is an act of less notoriety, cannot break or divide it; for such confirmation being an assent to an act which passed the whole, must extend to the whole which passed by the act.

3. What Estates they who make such Confirmation are to have.

As to the estate they who make such confirmation ought to have, to make the lease effectually binding upon the successors, this regards chiefly the patron, whose advowson or right of patronage, being a temporal inheritance, and considered as such, is to be governed by the same rules as other temporal inheritances are; and therefore his confirmation, being in nature of a charge upon the advowson, is to be directed by the estate which he hath in the advowson, and can continue no longer than that endures.

Therefore, if the patron be but tenant in tail, or tenant for life, his confirmation shall bind only such incumbents as come into the church during his own life: and accordingly it was agreed, by *Coke* and *Dodderidge*, that if a parson makes a lease for years, which is confirmed by the patron and ordinary, the patron being tenant in tail, and the patron and parson both die, and the issue in tail doth present another, his presentee shall hold the rectory discharged of such lease. And also they agreed, that although the issue in tail, after a presentation, levies a fine, yet the presentee of the conusee, when the church becomes void again, shall hold it discharged; because the confirmation was defeated by the presentation of the issue in tail before the fine levied. But if the patron, tenant in tail, discontinues the estate-tail, the lease confirmed by him shall stand good during the discontinuance: or if the estate-tail be barred, it shall stand good for the whole term: for now the estate of the patron, in respect whereof the estate was only voidable by the presentee of the issue in tail, is become an absolute and unavoidable fee.

So, if the patron had a conditional estate in the advowson, and he confirms a lease of the parson's, and after the condition is

Comp. In-
cumb. 372.

Co. Lit.
300.
Roll. Abr.
480.
Roll. Rep.
361.
Bridg. 95.
Lecon. 234.

Co. Lit.
300. b.

broken,

broken, this defeats also his confirmation, so that the succeeding incumbent shall not be bound by it; for his confirmation, which was in virtue of, and derived out of his estate in the advowson, could not be more lasting than that estate itself was.

Dyer, 252.
Roll. Abr.
480.

If the chaplain of a chantry or free chapel, that was a donative, had made a lease for years before the dissolution of chantries, and the patron of the chapel, being seised of the patronage in tail, had confirmed it, this should not have bound the chaplain of the issue in tail; because the tenant in tail could not, by any act of his, bind the issue in tail after his death: and in such case, if the patronage of the donative came to the king, by the statute of chantries, neither the king, nor his clerk, should be bound by the said lease. But if the donor had levied a fine after the confirmation, by which the issue in tail was bound from avoiding the lease, the king also should be barred: and as the issue in the other case would not have been bound, no more would the king, who comes in subject to all the advantages or disadvantages the issue in tail was capable of, or liable to.

Roll. Abr.
342.

If tenant in tail of an advowson, and the son and heir apparent, join in a grant of the next avoidance, and after the tenant in tail dies, the son shall avoid the grant, because he hath nothing in the advowson at the time of the grant made.

Dyer, 72. b.
in margin.
Leon. 234.
Lancaster v.
Lucas.

If a parson make a lease for years, and there be three coparceners or tenants in common, who are patrons, all ought to join in the confirmation, else it will not bind the next incumbent; because they are all but one patron; *per Coke*: but if there be a composition to present by turns, *quare*, if a lease confirmed by him, that hath the next turn when the church voids, shall not be good to bind his presentee? But in the first case [*viz.* the case in Dyer] it is held, that if one of the patrons, and the ordinary, confirm the lease, and the parson dies, and then the ordinary collates by lapse, this confirmation by the one patron is good, and that the collatee shall not avoid it; and this is said there to be adjudged upon long and good argument, and the case cited for it is *Lancaster* and *Lucas*; which does not appear to be adjudged in *Leonard*, but is there said to be adjourned? *ergo quare causam*; for the ordinary hath no interest, but presents in right of the patron, and therefore his clerk shall be so far bound, and no farther, than the clerk of him who suffered the lapse should have been. But *Popham* argued, that this title of lapse was an interest in the ordinary, and not an authority only, and then all who come in under that interest shall be bound by the ordinary's confirmation of the first lease: and he said, that at the beginning, the patron was not restrained to any time to present his clerk, but the six months were appointed, at the instance and suit of the ordinaries, by a canon confirmed in the council of *Lateran*; before which time the ordinaries had not any lapses; but after the said canon they had an interest, which the civilians call *interesse caducum & conditionale*; and it is such an interest, that if the bishop dieth before collation or presentment, so as the temporalities come to the king, the king shall present. *Quare* of this?

If the husband and wife, patrons of a church in right of the wife, confirm a lease made by the patron, yet this shall not bind the presentee of the wife, if she survives her husband, nor her heirs, nor their presentees, after her death; because the deed was void *quoad* the wife, being a feme covert, and the husband had nothing but in her right, which died with him.

Dyer, 133. a.
Roll. Abr.
479.

Though he who confirms as patron hath a fee-simple of the advowson in him, yet if, before he confirms, he hath granted away the next avoidance, his confirmation of the presentee's lease will not be good to bind the presentee of the grantee of the next avoidance, unless such grantee doth also confirm; and if the presentee of him that hath the next turn doth enter and avoid such lease (as he well may) and then dies, and the patron of the fee presents a new incumbent, who is admitted, instituted, and inducted, this new incumbent shall hold the benefice discharged of the lease, as his predecessor should have done, though he came in by the presentation and admission of the patron and ordinary, who confirmed the lease. So, if the bishop were patron in right of his bishoprick, and after such lease made by the parson, the bishop, dean, and chapter had granted the next avoidance to another, and then after they had all confirmed the lease; yet upon the incumbent's death, if the grantee of the next avoidance presents, and the clerk is admitted, instituted, and inducted, and avoids the lease, it shall never take place against any subsequent incumbent, though he come in by the same patron who confirmed such lease. The reason of these cases is, because the grantee of the next avoidance, and his presentee, come in by title paramount the making or perfecting of such lease; and the presentee, or parson, having the whole fee in him, when he had once defeated the lease, it shall never after revive or take place against any subsequent incumbent. And though *Littleton* seems to be of opinion, that the parson hath not the right of the fee-simple in him, yet he explains himself to mean as to the bringing of a writ of right; for otherwise it is the act of the parson which charges or gives, and the patron and ordinary only assent, and then the lease being avoided by him who hath the fee-simple of that land which was so leased, it can never after be set up again, being totally defeated by his title paramount. Another reason may be, that having granted the next avoidance before such lease made or perfected, the grantee is now become the present patron, and ought to concur in all acts whereby the possession is to be charged: for as before such grant, the patron's confirmation, who had the whole fee in him, would have been sufficient; so now, having granted away part of that fee, the grantee ought to join likewise, so that the confirmation may be by all who have any interest in the parsonage, as well those who have the present and possessionary interest, as those who have the future and reversionary interest; since otherwise the confirmation is not complete, and the lease is then liable to avoidance for want thereof.

Moore, 67.
481.
Dyer, 72. b.
133. a.
Cro. Car.
582.
Jon. 454.
Roll. Abr.
480.
Co. Lit.
46. a.
7 Co. 36.
Hob. 7.

If a church be full of a parson, and after another be made parson and inducted, and he make a lease for years, which is confirmed

Roll. Abr.
477.
9 H. 6. 34.

firmed by the patron and ordinary, yet the lease is void; because he who made it was not parson, the church being full before.

Roll. Abr.

47.

9 H. 6. 34.

10 H. 6. 11.

Degg. 120.

So, if a church be void, and one enter and occupy of his own wrong, without any presentation or institution, and occupy as parson, and make a lease for years, which is confirmed by the patron and ordinary; yet this is void, because the lessor was no incumbent; for none can be parson or incumbent without presentation or collation. So, a lease by a parson, vicar, prebendary, &c. before induction or instalment, though confirmed, shall not bind the successor, because till then they have nothing in the temporal possessions.

9 H. 6. 33.

34.

Roll. Abr.

480.

But if a church be void, and one present by usurpation, and the incumbent of the usurper, after admission, institution, and induction, make a lease for years, which is confirmed by the usurper as patron, and by the ordinary, and after, in a *quare impedit*, the true patron recover, and remove the incumbent; yet it seems the lease shall stand, because there was a patron *de facto*, who made and confirmed such lease; and the parson coming in by all the solemnities of law when the church was void, the people could take notice of no other, and therefore all acts done by him, and legally confirmed, are good. But *Rolle* cites this case, that the successor of the rightful patron, after recovery, shall avoid such lease, because it was not made or confirmed by a rightful parson or patron; *ideo quare*?

Dyer, 244.

Plow. 400.

Co. Lit.

352.

Co. 155. a.

10 Co. 48. a.

King *Ed. 6.* being patron of a church full of an incumbent, by his letters patent grants the advowson to the bishop of *Coventry* and *Litchfield* and his successors, and grants that, after the avoidance of the church by death, resignation, or otherwise, the said bishop, and his successors, should hold the said church *in propriis usus*; the bishop after, by indenture, makes a lease for forty years, to begin at such a time as the said parsonage should come to the hands of him, or his successors, by death, resignation, or otherwise; and this is confirmed by the dean and chapter; the bishop dies; then the incumbent dies; and the successor of the bishop enters, and makes a lease for twenty-one years, &c. And by the justices it was held, that the first lease was absolutely void; for the lessor had nothing in the parsonage impropriate during the life of the incumbent, and he survived the lessor, and therefore he could never take effect: and it could not be good by estoppel; because the truth of the case appeared in the indenture of lease itself, that he had nothing during the incumbent's life. This case further proves, that the whole fee is in the present incumbent; and, as in the cases before-mentioned, the avoidance of a lease by the present incumbent shall be an avoidance of it for ever; so in this case, for want of the present incumbent's joining, the lease shall never arise.

4. At what Time such Confirmation is to be made.

Co. Lit.

300. b.

As to the time of confirmation, generally speaking, it is not material, whether it be before or after the making of the lease, which

which is to be so confirmed, so it be made in the lifetime of the parties who make the lease; for the confirmation is but an assent or agreement by deed to the making such lease or grant, and not a confirmation of the estate itself, as will appear more fully by the following cases and diversities.

If a disseisor makes a charter of feoffment to *A.* with a letter of attorney to deliver seisin, and, before seisin given, the disseisee confirms the estate of *A.*, or the deed made to *A.*, this is clearly void, though livery be made after; for this must enure as a confirmation of the estate, which cannot be good before the estate passed, as before livery it did not. But if a bishop had made a charter of feoffment before the statutes with a letter of attorney, and the dean and chapter, before livery, confirm the deed, this is a good confirmation, and livery made after is sufficient. So, if the bishop had granted a reversion, the dean and chapter might confirm the deed or grant before attornment.

So, if a bishop at the common law had granted lands by deed to the king, and, before enrolment, the dean and chapter, by their deed, confirm the deed of the bishop, and after the deed of the bishop is enrolled, this is a good grant and confirmation; because, as to the bishop, it was a perfect deed, and therefore capable of being confirmed; though to enable the king to take, there wanted enrolment, which might be at any time after. The same law, if the bishop had made a lease for years to the king, confirmation of the lease before enrolment would be good.

So, if the patron and ordinary had by deed given licence to the parson to grant a rent-charge out of the glebe, and the parson had granted it accordingly, this was good, and should bind the successor, though it was not a confirmation subsequent, but a licence precedent.

So, if a bishop makes a lease for years at this day, which needs confirmation; and the lease is made on the second of *May*, and confirmed on the first of *May*, this is a good lease, by *Catlin* and *Southcot*; but *Wray* objected, that a lease cannot be confirmed before it be made; to which they replied, that the assent before was a good confirmation of the lease made after.

So, where a bishop made a lease the second of *May*, which was confirmed the third of *May*, and sealed the fourth of *May*; this was held a good confirmation.

So, where the deed of confirmation bore date before the deed confirmed, but by agreement the deed confirmed was first delivered, the confirmation was held good; for a confirmation is but a mere assent by deed to the grant, and therefore may be either before or after the grant or lease itself, or at the time of the lease or grant; as, if a parson makes a lease, with the assent of the patron and ordinary, this is a good confirmation; and so where the dean and chapter are to confirm likewise, if their respective seals are affixed.

And yet it hath been holden on the contrary; that if a confirmation be made and delivered before the grant or lease to be confirmed,

Co. Lit.
301. a.
3 Leon. 17.
4 Leon. 223.
Bishop of
Rochester's
case.

Co. Lit.
301. a.
Roll. Abr.
478.
Palm. 466.
Litch. 240.
Dimmock's
case.

Co. Lit.
300. b.
Roll. Abr.
480.
7 H. 4. 15.
Bro. Nov.
Calce, 201.
Owen, 33.

1 H. 6. 3.
Roll. Abr.
480.
Dyer, 106.

Roll. Abr.
480.
8 H. 6. 6.

firmed, that this is not a good confirmation; and though, after the grant or lease, the deed of confirmation be delivered again, yet that will not make it good, for that it was a deed by the first delivery; and the second delivery will not make it good as an assent, because the assent ought to be by deed, and the first delivery was void. But that confirmation may be made before the grant or lease be confirmed, the other cases are express, and the reason of the thing seems likewise to make for it; for the confirmation being nothing but an assent or agreement that the bishop or parson may make such lease, &c. when this assent appears under seal, and a lease, &c. made pursuant to it, there can be no reason to impeach the lease after, which has all the sanction that the law requires viz. the concurrence and assent of the persons appointed by law to that purpose, and before or after are only circumstances of time, which seem not material when the assent, which is the substance, sufficiently appears.

Moor, 66.
pl. 180.

Therefore, if a bishop makes a lease for twenty-one years according to the statutes, and after makes a concurrent lease for years of the same land to another, and after, before any confirmation of the second lease, the bishop makes another concurrent lease to a third person, which is immediately confirmed, and after the second lease is confirmed also; in this case the second lease shall be good and effectual by the confirmation, although the last lease was confirmed before it, because the confirmation adds nothing to it, nor conveys any interest, but only makes it more perdurable and effectual.

5 Co. 15.
Newcomen's case.
Cro. Eliz. 18.
Higgins v.
Grant.
Cro. Car. 38.
Cro. Jac. 53.

And upon this reason it hath been adjudged, that leases made before 13 *Eliz. c. 10.* for more years than are allowed thereby, being confirmed after the said statute, are good, and shall bind the successor; for the confirmation is only an assent, and when it is made relates to the making of the lease, which being before the statute, remains at common law, and, by consequence, binds the successor: also, such confirmations being only to perfect leases made before that statute, are not within the intent thereof.

Cro. Eliz.
430.
Moor, pl.
636.
Sir Edward
Denny and
Eakinfall.

So, where an archdeacon, impropiator of a parsonage, 12 *Eliz.* let part of his glebe for fifty years, and the bishop, patron of the archdeaconry, and the dean and chapter, 15 *Eliz.* confirmed the lease, and then the archdeacon died; it was held, 1. That the statute 1 *Eliz. c. 19.* extended only to the immediate possessions of the bishoprick, and here the land let was not any part of the possessions of the bishoprick, but of the archdeaconry; and the confirmation, though it is necessary, yet at most it amounts only to an assent, and the interest passes from the archdeacon and not from the bishop. But if the bishop had been disseised of any of the possessions of the bishoprick, and after had confirmed the land to the disseisor, this would not bind his successors, because here the confirmation passed an interest, and without such confirmation the bishop himself might have entered and restored the possession, and no act of his singly can bind his successor. 2. It was adjudged that this confirmation, though after 13 *Eliz. c. 10.* should bind the archdeacon's

archdeacon's successor, because the lease to which it relates was made before the statute, and that statute restrains only from alienating, not from confirming.

But if a bishop, parson, or any other sole ecclesiastical corporation, makes a lease for years, which needs confirmation, this confirmation ought to be made in the life and during the incumbency of the lessor; for after his death, resignation, deprivation, or other amotion, the lease is become void for want of confirmation; and then confirmation made after cannot revive it, though it be made in the vacation before any successor comes in.

But if a parson makes a lease for years, which is not confirmed by the bishop or patron then in being, but by the succeeding bishop and succeeding patron, this is a good lease, and shall bind the successor, because the lease was absolutely good against the parson himself who made it, and the confirmation was only necessary to make it binding on the successor; and in this case, the lease being duly confirmed during the incumbency, had all the sanction the law requires; for there is no prefixed time for the confirmation of such leases, so it be made during the life and incumbency of the lessor.

5. How far a Regard is to be had to the true naming of the Corporation or Persons who confirm.

Herein we shall only observe, that corporations aggregate, as dean and chapter, mayor and commonalty, warden and fellows, &c. may make or confirm leases, without expressing either the christian or surname of the dean, mayor, warden, &c. because in their politick capacity, as a corporation aggregate, they continue always the same, and are said never to die: but in leases or confirmations by a bishop, dean, mayor, &c. or other sole corporation, both their christian and surname, or at least their christian name, ought to be expressed, because they are subject to death and succession, &c. and therefore must be particularly named to shew whose lease, &c. it was; and so some hold too in the first case.

(H) Of void or voidable Leases by Ecclesiastical Persons: And herein,

1. Against whom Leases not pursuant to the Statutes, or otherwise defective, are void or only voidable.

HERE it is to be observed, that if a bishop grants the next avoidance of a church, which is not warranted by 1 Eliz. c. 19. because it is a thing which lies merely in grant, out of which no rent can be reserved; or makes a lease of the advowson of a church; or grants an annuity out of the possessions of his bishoprick; or makes a lease of tithes for three lives, or a lease of any other of his possessions, not pursuant to all or any of the eight rules before-mentioned; yet in none of these cases is such lease or

Co. Lit.
301.
21 H. 7. 1.
Degg. 118.
4 Leon. 78.
In which
last book the
contrary is
held by Clench.

5 Co. 15.
Cro. Car.
33.

Bro. tit.
Leases 45.
Dyer, 83.
86. 106.
11 Co. 21.
Hob. 32.
Leon. 307.
But for this
vide head of
Corpora-
tions.

Cro. Eliz.
440.
And. 241.
Sav. 119.
3 Co. 58.
Cro. Jac.
173.
2 Brownl.
164.
Cro. Eliz.
257. 690.

Hard. 326.
Co. Lit.
45. a.
10 Co. 59. b.
2 Leon. 138.
Leon. 308.
Roll. Rep.
169
Keb. 182.
11 Co. 73.
a.

grant void or voidable by the bishop himself who made it, but remains good against him during such time as he continues bishop. But as to the successors of the bishop, such leases or grants are void or voidable, as the case happens to be, as will appear hereafter. And the reason such leases or grants are good against the bishop himself, who made them, is, because they were so at the common law, and the statutes were made only for the benefit of the successors, that they should not be bound by those acts of their predecessors, which might turn to their prejudice and disadvantage; but not to give the bishop himself power to avoid or derogate from his own acts, which would be against all rules both of law and equity, and therefore was not within the meaning of the said statutes; for then he would be empowered by act of parliament to do wrong to other persons, which it cannot be presumed the parliament intended to allow.

Roll. Rep.
151.

So, where a bishop, by deed enrolled, gave lands to the queen, without the consent of the dean and chapter, yet it was held, that this was good against the bishop himself who made such gift.

Brownl. 21.
Moor, 875.
2 Brownl.
134. 152.
3 Co. 60.
Leon. 308.
Co. Lit.
45. a.

So, for the reasons before-mentioned, though the 13 *Eliz. c. 10.* says, that all leases, gifts, grants, &c. made by any persons or corporations therein mentioned, contrary to the tenor of that act, shall be utterly void and of none effect to all intents, constructions, and purposes; yet it hath been adjudged, that a lease made by a dean and chapter against the said statute shall not be avoided, nor any covenants therein contained, during the life and continuance of the dean that made the lease; so that if they have made a lease for years of any of their possessions, and before the expiration thereof made a concurrent lease also for the same lands, and then make a third lease for lives, with express covenant, that the grantee for lives shall enjoy the land against the second or concurrent lease; and grantee for lives being in possession is evicted, and brings covenant against the dean and chapter; in this case, though the lease for lives be void by the 13 *Eliz. c. 10.* yet it was agreed by the justices, that because the dean who made the lease for three lives was living, and continued dean at the time of the eviction, the lease was not void, and, by consequence, an action was well maintainable against the dean for breach of the covenant therein contained.

11 Co. 67.
78. b.
Roll. Rep.
171.

So, where a master and fellows of a college, by deed enrolled, made a lease for years, not warranted by that statute, and afterwards suffered a fine, and five years to pass without claim; though this was void against the succeeding master, yet by construction the lease and fine were held good against the college, (though it be a corporation aggregate that never dies,) during the life of the master, who was party to the lease, and made no claim; because he was the head and principal part of the corporation.

Hetley, 24.
Co. Lit.
45. a.
Comp. In-
cumb. 380.

So, if a dean, archdeacon, prebendary, parson, or other sole corporation, make leases of their sole possessions, not warranted by the said statutes, yet they shall bind themselves during their whole

whole time, because the statutes were made to provide chiefly for the benefit of the successors, and not to relieve the parties themselves against their own acts or grants; though it was held by *Popham*, that if a parson made a lease without reserving any rent, that this should not bind even himself; but *quare?*

But where there is a chapter that hath no dean, as the chapter of the collegiate church of *Southwell*, there, grants or leases made by them contrary to 13 *Eliz. c. 10.* are void *ab initio* against themselves: and so, of leases or grants by any other corporation aggregate, who have no head or principal person; for they must be either void *ab initio*, or good for ever, because they continue always the same, and one has no superiority or power more than another: but in case of a dean and chapter, master and fellows, &c. though they are a corporation aggregate, and never die, yet leases or grants made by them, contrary to the said statutes, shall bind during the time of the dean, master, &c. who was party thereto, because such dean, master, &c. who are the head of the corporation, are subject to death and succession, as other sole corporations, and therefore shall have no aid from the statute to avoid their own leases; but only their successors, for whose benefit the statute was made, together with the chapter. But if the dean and chapter, master and fellows, &c. were all equally seised, and the dean and master solely should make a lease, though it were in all respects warranted by the statutes, yet this lease seems void *ab initio* at common law, because the dean, master, &c. had no sole seisin whereof to make any lease at all; but the chapter in the one case, and fellows in the other, having an equal estate and interest, ought to have joined in such lease or grant, and for want of their joining, such lease or grant seems void at common law, as it would be for a misnomer, &c. and then the lessee cannot hold it against the dean and chapter, if they seek to avoid it.

As leases and grants, not warranted by the statutes, are not void against the lessors and grantors themselves, so neither are leases or grants made without due confirmation, where confirmation is necessary, but only by the grantor's death or amotion.

If a bishop makes a defective or voidable lease or grant, not only the successor, but also the king, when the temporalities come into his hands, may take advantage thereof, by avoiding it during the vacancy of the bishoprick, in privy and right of the bishop. But this shall not so absolutely avoid the lease, but that the succeeding bishop may make the same either good or void, at his election, as to himself; and this either expressly, as by actual agreement to the lease or grant of his predecessor; or implicitly, as by acceptance of rent incurred after the death of his predecessor; or doing any other acts, which amount to an agreement in law. And therefore this differs from the cases before put, where avoidance of a lease by a parson shall avoid it, not only for his own time, but also against all his successors; so that they can never after set it up again, or affirm it by any act of theirs whatsoever: for the parson hath the whole fee-simple in him as much as any of his successors can ever have; and therefore when he once

Mod. 204.
2 Mod. 56.
Hard. 326.
Leon. 308.
3 Co. 60.
Co. Lit.
45. a. 325.
b. 341.

Dyer, 239.

7 Co. 7.
The Earl of
Bedford's
case.

avoids the lease, as to the whole fee-simple which he hath, he avoids it for ever, so that it can never after revive; but the king hath not the fee-simple in the temporalities, but only the custody or guardianship of them during the vacation of the bishoprick, which is but a temporary and qualified interest; and therefore what he does shall not be binding on the successor. But if the successor himself avoids such lease or grant, then it is the same with the other case, and no succeeding bishop after can revive or set it up again, because it was avoided by one who had the whole fee-simple and estate in him.

But here a difference is to be observed betwixt such leases as are actually void by the death, &c., of the lessor, and such as are only voidable. And here again we must distinguish; 1. Between the person leasing. 2. Between the things leased, and the leases themselves. And because the common law, with respect to these distinctions, holds good still, where the several statutes before-mentioned are not pursued, we shall consider how the common law stood in these particulars, which, together with the reasons thereof, will shew how the law is at this day upon the statutes.

The first distinction to be observed is between the persons leasing; that is, between such sole corporations as had the whole fee-simple absolutely in them, as bishops, abbots, &c., and such sole corporations as were looked upon only to have a qualified fee-simple, as parsons, vicars, prebendaries, provosts in cathedral churches, and others who were presentative or collative, and not elective.

As to leases by parsons, vicars, &c., if by the common law any of these had made a lease for years of any of the possessions of their church, without confirmation of patron and ordinary, &c., such leases by their death, or other avoidance, had become absolutely void without entry or other ceremony, so as no acceptance of the rent, or other act done by the successor, could affirm or make them good or binding over against themselves. But leases for years by bishops, abbots, &c., though without confirmation of the dean and chapter, or assent of the convent, were not absolutely determined by their death, &c., but continued good till some act done by the successor to avoid them: for they have, and always were allowed to have, the whole fee-simple and inheritance of their possessions in themselves; and therefore, before the third council of *Nice*, anno 710, might by their sole alienation, without the confirmation of the dean and chapter, have bound their successor for ever: and though by that council such alienations are restrained, as hurtful and injurious to the church, and the confirmation of the dean and chapter made necessary; yet this is only *quoad* binding the successor; for the fee-simple continues still in them; and therefore leases for years made by them subsist after their death or removal, as they would do, if they had been made by a tenant in fee of any lay possessions, till the successor comes to avoid them by aid of the canons made at that council, which have received a sanction from our law,

Bro. tit.
Acceptance,
9, 10. 26.
tit. Con-
firmation,
21. tit.
Dean, 20.
tit. Leases,
18, 19. 32,
33. 52.
F.N.B. 50.
Plow. 264.
Cro. Eliz.
18. Poph.
121. Dyer,
46. 231.
Co. Lit. 45.
b. 102. 341.
6 Co. S. a.
Hert. 88.
Roll. Abr.
231. Roll.
Rep. 761.
Bridgm. 94.
3 Co. 65.
Raym. 166.
2 Keb. 325.

So, it was in case of abbots, priors, or deans, &c., where they were sole seised; if they had made a lease for years of any of their possessions, this had not absolutely determined by their death, &c., because they had the whole fee-simple in them; and therefore such leases continued good till the successor came to avoid them, for want of confirmation of the persons substituted by law for that purpose.

Vide the authorities supra.

Therefore, where a prebendary made a concurrent lease for years of tithes, rendering the ancient rent, without confirmation of the dean and chapter, it seems to be allowed, that this was not absolutely void by his death, &c., but only voidable; and then acceptance of the rent by the successor would make it good during his time: for leases not warranted by those statutes remain at common law, which makes them only voidable, not actually void upon the death, &c. of the person who makes them.

Hard. 156. Sir John Thoroughgood and Sir Henry Herbert.

The second distinction to be observed is, between the things leased and the leases themselves.

It has been before observed, that leases for years by parsons and vicars determine absolutely by their death, without entry, or other ceremony; but if they make a lease for life or lives, and die, or are removed, yet the lease continues good till some act done by the successor to avoid it: the reason is, because such lease for life or lives being an estate of freehold, could not pass without the solemnity of livery and seisin; and therefore to defeat that, there must be an act of equal notoriety, viz. the entry of the successor; and by consequence, if the successor before such entry accepts the rent, or does any other act signifying his consent to such lease, this affirms the same during his time, so as he can never after avoid it, because it was only voidable, not actually void by the lessor's death, &c., and, consequently, capable of an affirmation. And the law is the same at this day, as to things which lie in livery.

Vide the books supra.

But as to things which lie in grant or prebend, there seems a diversity between the common law and the law as it stands at this day upon the before-mentioned statutes: for if a bishop makes a lease for lives of a portion of tithes, or other things not manurable, reserving the ancient rent, and dies, &c., and his successor accepts the rent, yet this acceptance shall not bind him, because the lease was absolutely void by the bishop's death, &c., who made it without entry, or other ceremony. And the reason of its being so absolutely void is, because the things leased lying only in grant or prebend, no rent could be thereout reserved, recoverable by the successor; for distrain he could not, because there was nothing wherein a distress might be taken; and an action of debt would not lie (a), because the lease being for lives, no action of debt was maintainable till after the lives ended; and therefore since his acceptance of the rent due at one day will not enable him to sue for it, if afterwards denied, he shall not be bound by such acceptance. But if the tithes, or other things lying in grant, had been let for years, there, the successor's acceptance of the rent would have bound him during his time, because, then, he might have an action of debt for any arrears that should incur after. And this

Cro. Jac. 173. Comp. Incumb. 380-1. Palm. 175. Degg. 134-318. Bro. tit. Leases, 41.

[(a) But by 5 Geo. 3. c. 17. Debt will now lie upon such leases for lives.]

construction

construction seems to arise wholly from the statutes before-mentioned, which as appears before, were made wholly to provide for the successor, that he might not be impoverished or prejudiced by the acts of his predecessor: for at common law all leases for lives or years, as well of things which lay in grant as of things which lay in livery, were only voidable after the bishop's death, &c., not actually void: and herein the law at this day, as to bishops, appears to be the reverse of the common law as to parsons, vicars, &c., for as their leases for years were absolutely void by their death, &c., but their leases for life or lives only voidable; so here the bishops' leases for lives are absolutely void by their death, &c., whereas their leases for years are only voidable by their successor: but *quare*, whether the common law made any such distinction as to things in livery and things in grant, either in case of bishops, or parsons, vicars, &c.? for the only distinction taken notice of in the books is, between bishops, &c., who had the whole fee absolutely in them, and parsons, vicars, &c., who had only a qualified fee; and between leases for years by parsons, vicars, &c., and leases for life or lives made by them. But it seems clear, that if the law be so at this day as to bishops, when they make leases of things in grant, so it is as to all other ecclesiastical persons (except parsons, vicars, &c.), within the statutes before-mentioned, that leases for lives of things in grant determine absolutely by their death, for the reasons before given; but leases for years of such things in grant are only voidable by the successor, not absolutely void. But as to parsons, vicars, &c., leases for years made by them, whether of things in livery or things in grant, determine absolutely by their death, if not duly confirmed, or the statutes not pursued, because then they remain at common law, where their death or other amotion was an absolute determination of all leases for years in general made by them, and consequently, of leases for years of things in grant, as well as others. And this distinction in the principal case between leases for lives of things in grant, and leases for years thereof, by bishops and other ecclesiastical persons within the said statutes (except parsons, vicars, &c.), that in the one case, they are absolutely void by the death, &c., of the lessor, and in the other, only voidable, seems to be a reasonable distinction, and to reconcile all the books, which make it a great question, if leases in general by bishops, &c., not pursuant to the said statutes, are absolutely void by the death, &c. of the lessor, or only voidable. For if leases for years by them of things which lie in grant are only voidable, and not actually void, because the successor is not without some remedy for the rent, and therefore may adhere to that, if he pleases, and affirm the lease for his time; much less are leases for years or lives of things which lie in livery (though the statutes are not pursued), absolutely void by the death, &c. of the lessor, since in such cases the successor has as full and ample remedy for the rent by distress or otherwise, as he would have had if all the circumstances required by the statutes had been pursued; and then *quilibet potest renunciare juri pro se introducto*; and if the successor thinks fit to waive the defect of such circumstances, and

2 Roll. Rep.
161. Ed.
Coke's case.
Jon. 406.
Cro. Car. 95.
5 Co. 2.
10. Co. 60,
61. Cro.
Jac. 173.

abide by the lease, it would be unreasonable, and against the intent of the statutes, to put it out of his power so to do, by making the lease actually void, so as no acceptance of the rent, or other act done by him, could affirm it. But where his acceptance of the rent at one day will not help him to any remedy for it the next, there, it would be unreasonable that such an unwary act should strip him of the benefit intended for him by the said statute, and where he had no remedy for the rent, should have none for the land neither, and would totally frustrate the design and intent of the act, and tend to the impoverishment of most successors to ecclesiastical persons.

But this acceptance of rent (*a*), which shall affirm a voidable lease, must be by him who is perfect successor: therefore, where the successor of a bishop, before he had a restitution of the temporalities out of the king, accepted the rent reserved by his predecessor upon a voidable lease, it was held, that notwithstanding this acceptance, he might well enter and avoid the lease; because before such restitution he was not perfect successor; and then such acceptance of the rent shall not bind him, any more than if he had been a perfect stranger.

not a sufficient confirmation of a lease. It cannot be a confirmation, unless done with a knowledge of the title at the time; or, unless the remainder-man lies by, and suffers the tenant to lay out his money in improvements, in confidence of continuing tenant. *Per Lord Mansfield, Cowp. 483.*

So, where a master of a college, or head of any corporation aggregate, accepts rent upon a voidable lease made by his predecessor, and the rest of the corporation, without authority in writing from the corporation to accept the same, this acceptance shall not affirm the lease during the life or continuance of such master or head who so accepted it; for the right being as much in the fellows, or other members of the college, as in the master, &c. himself, he cannot by any act of his own conclude or bind them from their entry upon any voidable lease. Besides, he himself, in their right, may enter to avoid such lease, notwithstanding his own acceptance of the rent.

If a bishop's bailiff, of his own head, and without any order from the bishop, receives rent upon a voidable lease made by the predecessor of the bishop, this shall not bind the bishop. But where a bishop made a lease for lives of certain lands, parcel of the manor of *A.*, reserving rent, but not in all things pursuant to the statutes, and by consequence, voidable by the successor, and then the bishop died, and another was made, and the bailiff of the manor came to him, and shewed him in general, that there were certain rents in arrear of the said manor, and thereupon the bishop commanded him to receive the said rents, which he did accordingly, and, amongst the rest, the rent upon the said voidable lease, and after paid all the said rents to the bishop, without giving him notice particularly of that rent; this acceptance shall bind the bishop, because he ought to take notice what leases are made by his predecessor, and what rent he himself received; for, if he had no title, he ought not to have received the rent at all; if he had, he

must

Palm. 517.
Bishop of
Oxford's
case.

[(*a*) Ac-
ceptance of
rent alone,
unaccom-
panied with
any other
circum-
stances, is

11 Co. 79.
a. Roll.
Rep. 172.
Magdalen
College's
case.

Roll. Abr.
474.
Hetley, 24.
Cro. Car.
95. Wheeler
v. Darby.

must be supposed to know it; and then his acceptance of the rent shews his assent to the lease upon which it was reserved.

Poph. 121. Also, it is to be observed, that so far as the lessor is bound by
Leon. 309. any void or voidable leases, so far also the lessee, his executors or assigns, whichever of them have the interest, are bound thereby, and no further: therefore, when the lease is not void without entry, if rent be in arrear after the death of the predecessor, the successor hath remedy to recover such arrears, if he chuses to affirm the lease; but if the lease be absolutely void, the successor hath no remedy at law for any rent incurred after the death of his predecessor.

Leon. 309. So, the lessee of a voidable lease, after the death of the lessor, may maintain an action of trespass against any stranger, who shall enter or do any other act of trespass upon the land before the lease be actually avoided.

2. By what Means and in what Cases such voidable Leases may be made good.

Dyer, 239. This in a great measure has been explained under the foregoing
Fitz. tit. division: it remains only to shew, that, besides acceptance of the
Abbot, 9. rent, there are other ways by which such voidable leases may be
Bro. tit. affirmed; as, by distraining for rent due at the death of the pre-
Accept- decessor; or by bringing an action of waste against the lessee; or,
ance, 15. in case the lease be for life or lives, by bringing an assise for the rent due after the death of the predecessor; or acceptance of fealty from the lessee: all these amount to an affirmance of such voidable leases, and make them good against the person who so affirms them, for his own time; because these acts shew a sufficient intent in the successor to continue and acquiesce in the leases made by his predecessor.

3. The Manner of avoiding such Leases as are only voidable.

Dyer, 222. This may be done either by entry, where the lease is of things
Ayer and corporeal and manurable; or by claim, where the lease is of things
Ome. Sid. 7. incorporeal: as, where a lease for years is made, rendering rent,
Young and upon condition to be void for non-payment; this lease shall not be
Wright. void without a demand made of the rent: for if it were otherwise,
Dyer, 28. a. it would be in the power of the lessee to make the lease void at
in margin. any rent day he thought fit, and so to add the wrong of making the lease void to that of non-payment of the rent.

Moor, 52. And where an entry is to be made, this may be done either by
Dyer, 222. the bailiff of the party that would enter, or by other persons deputed for that purpose: but a bailiff, merely in virtue of his office, cannot make an entry for his master without special warrant, because his office is to manage his master's lands, and to take the profits thereof to his master's use; but to gain new lands, which the master had not before, does not belong to his office as bailiff. Besides, an entry being a thing which the master may or may not make, his bailiff shall not determine his election therein.

Where

Where a corporation aggregate have title of entry to avoid a lease, they cannot command their bailiff to enter, unless it be by deed; for their parol command in such case is void, and the entry thereupon tortious, because as a body politick they are invisible, and incapable of acts as natural persons are: but yet, *per curiam*, if one distrains as bailiff to a corporation, though in truth he be not bailiff, yet he may make conufance as such, and if the corporation agree thereto, it is good without deed, because the command he had in such case is not traversable.

But a bishop may by parol command his servant to demand a rent or make an entry, and this is good; because as a sole corporation he is capable of the same acts as all natural persons are.

A dean and chapter made a lease for years, rendering rent, but for default of payment the lease to be void; the rent was in arrear, and not paid: then they made a new lease to another person, and affixed their seal to it in the chapter-house, before any entry made upon the first lessee, and at the same time made a letter of attorney to one to enter and make delivery of this lease upon the land, who accordingly did it. It was objected, that this second lease was void, because the deed being perfected as the deed of the corporation, by their affixing their seal to it, the delivery after by the attorney was void, it being perfect before; and the first perfection of it as a deed could not make it a good lease for years, because the first lessee was in possession, and they made no entry to avoid it. But it was held to be a good lease, and that there was no other means for a corporation to make a lease but this: and *Gawdy* said, it was not the deed or lease of the corporation till delivery, as of another person; and therefore, where it is said in *Davis* 44. to be agreed, that if a dean and chapter put their chapter seal to a deed, this is a perfect deed thereby, without any delivery; this must be understood when the dean and chapter are in possession, not when they are out of possession, or have only a right: and so the diversity appears to be taken upon the books; for otherwise the lease must be inevitably void in such case; for till it be sealed, the attorney cannot deliver it as the deed of the corporation; and if the sealing perfects it presently as their deed, so that it cannot be delivered after, then it is void for want of an entry, and so all ways the lease would be void; which would be a very unreasonable construction, when it may be so easily avoided. And in the latter books it is said, that though the putting of the seal of a corporation aggregate to a deed carries with it a delivery, yet the letter of attorney to deliver it upon the land suspends the operation of it as an escrow till entry, &c. But yet the corporation, if they think fit, may after the indenture of lease engrossed make a letter of attorney to another, to seal and deliver it as their deed or lease to the lessee upon the land, without first affixing their seal to it: and so it was done in the case of the warden and fellows of *All Souls College* in *Oxford*. But then, as it seems, the attorney must affix the corporation seal to it, and not any other seal. Yet in one book it is held *per curiam*, that a corporation aggregate, as there the president, fellows, and scholars of *St. John's College*

Roll. Abr.
514. b.
Dumper v.
Syms. Bro.
tit. Corpora-
tion, 9.
6 Co. 38.
4 Co. 119.

4 Leon. 181.
Wood v.
Chiver.

Cro. Eliz.
167.
2 Leon. 97.
Willis v.
Jermin.

Dav. 44.
1 Roll.
Abr. 23.
Flud and
Gregory.
Vent. 257.
3 Keb. 307.
Good v.
Ash.

Leon. 106.
Carter v.
Claypool.
Bulf. 119.
President,
&c. of St.
John's Col-
lege v. Lord
Norris.

College in Oxford, making a lease, are to subscribe and seal it, and then deliver it by their attorney, having a letter of attorney for it, and that they could not deliver it in any other manner; but whether the attorney might also affix their seal or not, is not mentioned in the case.

(I) Of Leases made by those who have but a particular Estate or Interest in the Lands leased: And herein,

1. Of Leases made by Tenant in Dower or Curtesy.

Bro. tit.
Accept-
ance, 14. 19.
Tit. Leases,
17. 19.
Plow. 30.
272. Cro.
Car. 398,
399.
Jon. 254.
Vaugh.
So-1.

AS to these, it will be sufficient to observe, that if tenant in dower or by the curtesy make a lease for years, reserving rent, and die, this lease is absolutely determined, so that no acceptance of the rent by the heir or those in reversion can make it good. For though their estate is *quodam modo* a continuance of the estate of the husband or wife, yet it is a continuance of it only for life, and they have no power to contract for, or intermeddle with the inheritance, and, consequently, their leases or charges fall off with the estate whereout they were derived, and the lessee is become tenant by sufferance by his continuance of possession after.

2. Of Leases made by Tenant for Life.

Poph 105.
Co. 147.
Anne May-
hew's case.
[(a) His
leases are
merely void
upon his
death, and
therefore
cannot be set
up against
the remain-
der-man by
his accept-
ance of rent,
and suffering
the tenant to
make im-
provements
after his in-
terest vests
in posses-
sion. Doe v.
Butcher,
Doug. 50.
But *qu.*
whether in
such case
equity would
not relieve?
Stiles v.
Cowper, 3 Atk. 692.]

Tenant for life can make no leases to continue longer than his own life (a). But if tenant for life makes a lease for twenty years generally, and after he in the reversion confirms that lease, and then the tenant for life dies; though this at first would have determined by the death of the lessor, yet the confirmation hath made it good and unavoidable for the whole term. But if the lease had been for twenty years, if the lessor tenant for life should so long live, there, if the reversioner had confirmed this lease, yet it would not prevent its voidance upon the death of the tenant for life. The diversity between which cases is this, that in the first case the lease being made generally for twenty years, nothing appears to the contrary but that it was a good lease for that time absolutely; for the death of the lessor, which would determine it sooner, does not appear in the lease itself: then when the reversioner, who alone could take advantage of that implied limitation, thinks fit to waive it, and confirms the lease, as it was made at first, for twenty years absolutely, this makes it *his own lease* for so much of the time as would have fallen into his reversion by the death of the tenant for life, before the twenty years run out: but in the other case, the death of the tenant for life being made the express limitation and circumscription of the twenty years in the lease itself, no confirmation of that lease, as so limited, can enlarge it to extend beyond the life of the lessor, that being the express determination affixed to it.

And

And yet we find one case where it is held, that if a man makes a lease for twenty-one years, if the lessee so long live, and after the lessor and lessee join in a grant by deed of the term to another, and after the first lessee dies within the twenty-one years, that yet the grantee shall enjoy it during the residue of the term absolutely. But to reconcile this case with the other, it must be intended, that in the assignment no notice is taken of the express limitation affixed to the lease, but that they joined in an assignment of the lease for the residue of the twenty-one years, and then it may well be construed to amount to a *confirmation by the lessor* for that time, as the lessor may confirm the land to the lessee for any longer time, and thereby enlarge his estate or interest.

If *A.*, lessee for the life of *B.*, make a lease for years by indenture, and after purchase the reversion, and then *B.* die, *A.* shall avoid his own lease, notwithstanding he hath now an estate capable of supporting the lease for the whole term; for he may confess the lease for years as it was, and avoid it by shewing his own estate in the lands at the time of that lease made; and he is not estopped to do this, because the lease took effect in point of interest.

B., tenant for life of *C.*, and he in the remainder or reversion in fee, join in a lease for years by indenture; this during the life of *C.* is the lease of *B.*, who then only had the present interest in the lands, and the confirmation of him in the remainder or reversion; but after the death of *C.*, then this becomes the lease of him in the reversion or remainder, and the confirmation of *B.*: for the lessors having several estates in them in several degrees, the lease shall be construed to move out of each one's respective estate or interest as they become capable of supporting thereof, which is the most natural and useful construction of the lease, especially as there can be no estoppel in this case, by reason of the several interests which passed from each. And therefore during the life of tenant for life, if the lessee, being evicted, should declare of a lease by both, this would be against him, as was adjudged, because for that time it was only the lease of the tenant for life.

[*A.* tenant for life, and *B.* the reversioner: *A.* only executes a lease, in which they are both named: upon *A.*'s death, this lease is totally void. And though *B.* should execute it afterwards, it will not bind the lessee; for it is not his covenant.]

3. Of derivative Leases, or by one who is but a Lessee for Years himself.

As a lessee for years may assign or grant over his whole interest; so he may grant it for any fewer or less number of years than he himself holds it; and such derivative lessee is compellable to pay rent, perform covenants, &c. according to the terms agreed in such grant or agreement. Also it is said in (*a*) *Broke*, that a termor so assigning may distrain for the rent, without any power reserved for that

10 Co.
49. a.

Co. Lit.
47. b.
6 Co. 15. a.
Roll. Abr.
378.

Co. Lit.
45. a.
Dyer, 234. b.
Moor, pl.
196. pl.
939.
Poph. 57.
6 Co. 14.

Ludford v.
Barber,
1 Term
Rep. 86.

Vide tit.
Assignment
and Cove-
nant.

(a) Bro. tit.
Distr. 7.

that purpose, though a person who assigns his whole interest cannot, because he has no reversion.

2 Vern. 175. For a derivative lessee is not liable to the rent reserved on the original lease, otherwise than as his cattle may be liable to a distress for rent-arrear to the original lessor, as any stranger's levant and couchant may be; for there is no privity between him and the original lessor, as there is between a lessor and assignee; and therefore such-a-one, though he take the whole term, except one day, shall not be liable to any of the covenants in the original lease (b).
 374. & vide Cro. Eliz. 157.
 Leon. 279. [Holford v. Hatch,
 Dougl. 183. (b) Hence, a derivative lease cannot

have the effect of working a forfeiture under a proviso not to assign. *Cruce v. Bugby*, 3 Will. 234. 2 Bl. Rep. 766.]

Palmer v. Edwards, Dougl. 187. note. But such a departure with the whole term, if bad as an assignment, not being in writing, would be supported as an under-lease against the grantor. *Poulteney v. Holmes*, 1 Str. 435. Dougl. 186.

[When the whole term is made over by the lessee, although in the deed by which that is done, the rent and a power of entry for non-payment are reserved to him, and not to the original lessee, this is an assignment, and not an under-lease: and therefore, the original lessor, or his assignee of the reversion, may sue or be sued on the respective covenants in the original lease: and this, although new covenants are introduced in the assignment.]

Preced. Chan. 124. Colchester v. Arnot. 2 Vern. 383. S. C.

Lessee of a prebend made an under-lease, and the lease being pretty far spent, he requested the tenant to surrender, to enable him to renew, and offered to give any security to grant him a new lease for so many years as he had to come in his old one; but the tenant was obstinate and would not, unless his landlord complied with some demands of his; upon which the landlord brought his bill in equity to enforce him to a compliance: but my Lord *Keeper* said, though it were a benefit to the plaintiff, and no prejudice to the defendant, yet there being no agreement in the deed for that purpose, he could do nothing in it.

But now by the 4 G. 2. c. 28. § 6. it is enacted in the words following, viz. "Whereas many persons hold considerable estates
 "by leases for lives or years, and lease out the same in parcels to
 "several under-tenants, and whereas many of those leases cannot
 "by law be renewed without a surrender of all the under-leases
 "derived out of the same, so that it is in the power of any such
 "under-tenants to prevent or delay the renewing of the principal lease, by refusing to surrender their under-leases, notwithstanding they have covenanted so to do, to the great prejudice
 "of their immediate landlords, the first lessees; for preventing
 "such inconveniencies, and for making the renewal of leases
 "more easy for the future, be it enacted by the authority aforesaid, that in case any lease shall be duly surrendered in order
 "to be renewed, and a new lease made and executed by the chief
 "landlord or landlords, the same new lease shall, without a surrender of all or any the under-leases, be as good and valid to all
 "intents and purposes, as if all the under-leases derived thereout
 "had been likewise surrendered at or before the taking of such
 "new lease; and all and every person and persons, in whom any

" estate for life or lives, or for years, shall from time to time be
 " vested by virtue of such new lease, and his, her, and their exe-
 " cutors and administrators, shall be entitled to the rents, cove-
 " nants, and duties, and have like remedy for recovery thereof;
 " and the under-lessees shall hold and enjoy the under-messuages,
 " lands, and tenements, in the respective under-leases comprised,
 " as if the original leases, out of which the respective under-leases
 " are derived, had been still kept on foot and continued; and the
 " chief landlord and landlords shall have and be entitled to such
 " and the same remedy, by distress or entry in and upon the mes-
 " suages, lands, tenements, and hereditaments comprised in any
 " such under-lease, for the rents and duties reserved by such
 " new lease, so far as the same exceed not the rents and duties
 " reserved in the lease, out of which such under-lease was de-
 " rived, as they would have had in case such former lease had
 " been still continued, or as they would have had in case the re-
 " spective under-leases had been renewed under such new princi-
 " pal lease; any law," &c.

4. Of Leases made by a Disfeisor or Disfisee.

If a disfeisor makes a lease for years, or grants a rent-charge, and the disfisee confirms it, and after re-enters, yet he shall not avoid the lease or rent, because by his confirmation of them he hath departed with so much of his ancient right, which incorporates and mixes with the lease or grant, so that he can never after avoid them.

Co. Lit. 300.
 Poph. 50.

If one be disfeised of lands, and whilst he is out of possession he intend to make a lease for years, the way is to prepare a deed of lease, and after he hath signed and sealed it, before any actual delivery thereof, as his deed, to deliver it as an escrow to a third person, to be delivered as his deed after entry and actual possession taken in his name; or after signing and sealing before actual delivery, he may make a letter of attorney to a third person, to enter upon the land in his name, and after such entry to deliver it upon the land, or elsewhere, as his deed, to the lessee; and though such letter of attorney be affixed to the deed, (and to make it an effectual letter of attorney, it must be sealed and delivered,) yet the sealing and delivery of that by the lessor, though affixed to the deed of lease, will not be construed a delivery of the lease itself, because no such intent appears, but the contrary; and therefore the delivery of the letter of attorney shall have no more influence upon the deed of lease, than if it had not been affixed thereto: or such disfisee may prepare a deed of lease, and at the same time execute a letter of attorney to a third person, to enter upon the land, and after such entry to sign, seal, and deliver the lease as his act and deed to the lessee: and all these ways are good, because the delivery is the essential and finishing part of a deed; and if the possession and seisin be reduced before that comes, the delivery after is as effectual as if the whole deed had been prepared and executed after; because till the delivery, the deed took no effect,

Co. Lit.
 48. b.
 Cro. Eliz.
 483. Ste-
 phens v.
 Elliot.
 3 Co. 55.
 Cro. Eliz.
 446.
 Jennings v.
 Bragg.
 2 Bendl. 81.
 2 Roll.
 Abr. 25.
 Davis v.
 Bridges.

and when the delivery was, he was in actual possession, and consequently might make such lease. But if such disseisee, being out of possession, had sealed and delivered the deed of lease as his deed, though he had after actually entered upon the land, and then delivered the lease again as his deed, yet no interest would pass to the lessee by either of these deliveries; for, as his deed, it took absolute effect by the first delivery, and then the second delivery, to make it his deed, was void and to no purpose; for a deed cannot have two deliveries: and the first delivery, to make it a lease, was void, because he was then out of possession, and had only a right of entry, which he could not transfer to a stranger; and therefore the lease is absolutely void to carry any interest to the lessee. And so it would be, if after such delivery of it as his deed, he had made a letter of attorney to enter and deliver it as his deed upon the land; for the first delivery made it his deed effectually; but that could pass no interest, because he was then out of possession; and the second delivery to make it a deed was void, because it was his deed by the first delivery, and therefore cannot be delivered again; and *quære*, in the case above-mentioned, if the letter of attorney were at the conclusion of the deed of lease, in the very same parchment or paper, whether the disseisee could distinguish his sealing and delivery of that as a letter of attorney, so that it should not amount to a sealing and delivery of the deed itself, and thereby make void any after delivery, when the possession and seisin were reduced?

Flow. 137. The heir after the death of his ancestor, before any actual entry, may make a lease for years, because the possession in law was cast upon him immediately by the death of his ancestor, and none had possession in fact. But if a stranger first enter by abatement, then such lease made by him after will be void; because by the entry the stranger gains possession in fact, which devests the possession in law of the heir, so that the heir hath neither possession in fact nor law, whereof to make a lease, and consequently, the lease must be void.

Bro. tit. Leases, 57. Sav. 55. If the heir of the king's tenant *in capite*, or in socage, before livery, or after office found, makes a lease for years, this seems to be good; for such lease being only a contract between the lessor and lessee, may be made before any actual entry, by reason of the possession and seisin in law, which were cast on him by the death of his ancestor. But if he make a feoffment in fee, or a lease for life before livery sued, these cannot be made without actual entry into the land to make livery of seisin, and such entry would be an intrusion upon the king's possession, and amounts to a forfeiture, by attempting to take a freehold out of the king.

5. Of Leases made by Joint-tenants or Tenants in Common.

As to leases by joint-tenants and tenants in common, we shall here, for method sake, set down some of the most remarkable cases relating thereto, though these matters are more fully treated of under their proper heads.

1. Then,

1. Then, if two joint-tenants are in fee, and one lets his moiety to J. S. for years, to begin after his death, this is good, and shall bind the other, if he survives; because this is a present disposition, and binds the land from the time of the lease made, so that he cannot after avoid it. But a devise for years in such manner, by one joint-tenant, would not bind the other surviving, because that is no present disposition, nor binding upon the devisor himself, inasmuch as he may revoke or cancel his will, and so destroy that devise; and therefore such devise, not taking effect to any purpose till his death, comes too late to prevent the survivorship, which being the elder title, shall be preferred, and shut out the devise. So, all grants or charges by one joint-tenant out of the land, fall off with his life, and cannot affect the survivor, because they being no immediate disposition of the land itself, that comes whole and entire to the survivor under the first title, and, by consequence, over-reaches all intermediate charge or grants thereof by the other joint-tenant who is dead.

Co.Lit. 163.
Bro. tit.
Grants, 154.
Roll. Abr.
848.

But if one joint-tenant grants *vesturam* or *herbagium terræ* for years, and dies, this shall bind the survivor. So, if two joint-tenants are of a water, and one grants a separate piscary for years, and dies, this shall bind the survivor; because in these cases the grant of the one joint-tenant gives an immediate interest in the thing itself whereof they are joint-tenants.

Co.Lit. 186.

If two joint-tenants for life are, and one of them makes a lease for years of his moiety, either to begin presently, or after his death, and dies, this lease is good and binding against the survivor; the reason whereof is, that notwithstanding the lease for years, the joint-tenancy in the freehold still continues, and in that they have a mutual interest in each other's life, so that the estate in the whole, or any part, is not to determine or revert to the lessor till both are dead; for the life of the one, as well as of the other, was at first made the measure of the estate granted out by the lessor; and therefore so long as either of them lives, if the joint-tenancy continues, he is not to come into possession. Now these joint-tenants having a reciprocal interest in each other's life, when one of them makes a lease for years of his moiety, this does not depend for its continuance on his life only, but on his life and the life of the other joint-tenant, whether of them shall live longest, according to the nature and continuance of the estate whereout it was derived; and then, so long as that continues, so long the lease holds good, and, by consequence, such lessee shall hold out the surviving joint-tenant and the reversioner, till the estate, whereout his lease was derived, be fully determined. But if a rent were reserved on such lease, this is determined and gone by the death of the lessor, for the survivor cannot have it, because he comes in by title paramount the lease; and the heirs of the lessor have no title to it, because they have no reversion or interest in the land: but *quare*, if the executors or administrators cannot maintain an action of debt or covenant, either upon the covenant in law, or express covenant, for payment of the money, if there be any?

Moor, pl.
514.
Poph. 96.
Harbin v.
Barton.
3 Bull. 273.
Roll. Rep.
401.
Dyer, 187.
Plow. 263.
Cro. Jac. 91.
3 Bull. 131.
Co. Lit.
184. b.

Co. 96.
Co. Lit.
185. a.
Moor, 139.

Cro. Jac.
91. Moor,
pl. 1074.
Witlock v.
Horton.

A. and *B.* joint-tenants for their lives; *A.* by indenture leases the moiety which he holds in jointure with *B.* to *C.* for sixty years from the death of *B.*, if he the said *A.* should so long live, and demises the other moiety to *C.* for sixty years from his own death, if *B.* shall so long live; then *A.* dies, and *B.* survives: it was adjudged, that this lease was void for both moieties; for by the first words it was a good lease from *A.* of his part, upon the contingency of his surviving *B.*, but that never happened; and as to *B.*'s part, *A.* had no power to lease or contract for it during the life of *B.*, though he had happened after to survive him, for that it was but a bare possibility, which could not be leased or contracted for; and therefore the lease was void in the whole.

Cro. Jac.
377. Roll.
Rep. 309.
3 Bulf. 130.
Roll. Abr.
131. Daniel
and Wad-
dington.

A. and *B.* joint-tenants for their lives, *A.* leases his part for sixty years, if he and *B.* so long live, then *B.* surrenders his part, and takes back a new estate; then *A.* dies, living *B.*: it was adjudged, that this lease made by *A.* was determined by his death; for the joint-tenancy, which would have given them, or their lessees, an interest in each other's life, is by the surrender of *B.* determined and gone, and then the lease of *A.* stood single on his own life, and consequently, by his death is determined. So it would be, if after such lease for years by one joint-tenant, they had made partition of the joint-estate, and then the lessor had died, his lease would be at an end, because the joint-tenancy, which should have supported it after his death, is by the partition defeated and gone.

Co. Lit.
186. a.
Cro. Jac.
83. 611.
Moor, pl.
194. Roll.
Abr. 851.

If one joint-tenant or tenant in common makes a lease for years of his part to his companion, this is good; for this only gives him a right of taking the whole profits, when before he had but a right to the moiety thereof; and he may contract with his companion for that purpose, as well as he may with any stranger.

6. Of Leases made by Copyholders.

Moor, 184.
Salk. 186.
pl. 5.

If a copyholder takes upon him to make leases, not warranted by the custom of the manor, and without the lord's licence, this is a forfeiture of his copyhold, but no disclaim to the lord; and the lease is good against every body but the lord.

Moor, 292.
Hett. 122.
Bulf. 189.

And it seems not to be material whether such lease be by parol or in writing; but it must be a perfect lease, and must have a certain beginning and certain end, for otherwise the lease is void, and carries but an estate at will at most; which is no forfeiture.

2 Mod. 79.
Richards
v. Seley.

A., copyholder for life, having got *B.* to be bound with him for 100 *l.* and given him a counter-bond, executes a deed, whereby reciting the counter-bond, and the estate *A.* had in the lands for life, *A.* covenants, grants, and agrees for himself, his executors, administrators, and assigns, with *B.*, that he, his executors and administrators, should hold and enjoy these lands, from the making of the deed, for seven years, and so from the end of seven years to seven years, for and during the term of forty-nine years, if *A.* should so long live, with a covenant, that if the 100 *l.* were paid, and *B.* indemnified, the deed should be void: the question was, whether

whether this would amount to a lease for forty-nine years, if the copyholder should so long live; and so being in the case of a copyhold, and no custom to warrant such lease, be a forfeiture of the estate? And it was argued to be no lease, because such construction would be a wrong to both parties; to the one, by defeating his security, and to the other, by a forfeiture of his estate; which would be unjust; when by construing it only to be a covenant for the whole, each might be safe, and their intention answered; and it was said, that the cases, wherein such words have been held to amount to a lease, were all of them of freehold, where no such mischief could ensue: but the court, notwithstanding, inclined this was a good lease by the intention of the parties, and consequently a forfeiture; for then the jury would have found it so; but if the words had been doubtful, and such as would admit of divers constructions, there, to prevent a forfeiture, it should be taken to be only a covenant; but here, the words are plain and clear: but no judgment was given.

A copyholder, by articles of agreement, covenanted and promised with another, that he should hold for a year at *halves*, according to the custom of the manor, at such a rent, and so from year to year for five years: this was adjudged no forfeiture, for the prejudice that would ensue on such construction to the copyholder: also, the lease being worded *secundum consuetudinem manerii* is tied up to the custom of the manor; so that if there be no custom to warrant this manner of leasing, the lease itself falls to the ground: also, there was further in the lease a covenant, that if the lessor put out the lessee, he should be allowed so much rent by way of retainer; so that the lessee was at uncertainty whether he should enjoy it during the whole term; for this gave the lessor liberty to put him out, making the allowance agreed upon, and stipulated between them: and besides, it was doubted if the words *covenant and promise that he should enjoy* for such a time, would amount to a lease, or were not rather relative to enjoying after a lease made: for the word *covenant* is none of those reckoned up to make a lease; and in the cases where it hath been so held, it was joined with the word *agreavit*, which imports a mutual consent or agreement of both parties; and here, though there be the word *agreed or agreement*, yet it is only in the style of the articles. Also, here, the covenant is quietly to enjoy, which *a fortiori* does not make a lease, but regards only the manner of enjoying it after a lease made, and being only to hold at halves, it can be no lease. This is the manner of reporting this case, which arises so by jumps and steps, and is so incoherently put, that it is hard to conclude any thing from it relative to the matter before us: besides that the gist of the case seems to turn upon the words *holding at halves*; for they are to govern and explain the words *covenant and promise*, which of themselves may be applied to ten thousand other things, and have no meaning at all, till the subsequent words explain what it is he covenants and promises: and the words *holding at halves* are of so ambiguous and doubtful a signification, that according to the rule taken in the foregoing case, they might well leave room for

2 Keb. 257.
Lenthall v.
Thomas.

Cro. Eliz.
143. Hare
v. Cicely.

the court to make such a construction as should prevent a forfeiture: and in one case it is expressly held, that *exposing to half* is no lease, but only a liberty to plough and sow, but passes no interest, nor can the lessee have trespass for breaking the soil: but in the same book it is said, that if he had exposed it to halves for two or three *crops*, this had been a lease.

La'ch. 199.
Godb. 364.
Jon. 157.
Noy, 92.
in all the
S. C. be-
tween Ash-
field and
Ashfield.

An infant copyholder, without licence of the lord, made a lease for years by parol, rendering rent, and at full age was admitted, and accepted the rent, and then ousted the lessee. In this case, though it was agreed, that a lease for years, rendering rent, by an infant, of freehold lands, was only voidable; yet it was urged, that in case of a copyhold it would be otherwise; because the lease not being warranted by the custom, would be a disseisin to the lord, and, consequently, a forfeiture of his copyhold, which being a great mischief to the infant, the court ought rather to help him, by adjudging such lease to be absolutely void. But, notwithstanding this, it was adjudged, that the lease was a good lease till avoided, and that a lease for years by a copyholder without licence is not a disseisin: and admitting it should be a forfeiture in this case, yet if the lord enters for it, the infant may re-enter upon him, and so is at no mischief; and therefore he, having accepted the rent at full age, hath made it good and unavoidable. And *Jones* says, that it was held to be no forfeiture as to the lord; but that admitting it were, yet it was a good lease as to all strangers; and that for this reason principally it was adjudged such acceptance had made it good.

Cro. Car.
233. Jon.
249. Roll.
Abr. 508.
Matthews
v. Wheleston.

A copyholder for life made a lease for a year by indenture, dated such a day, and the same day, by another indenture, makes a second lease to the same party for a year, to commence such a day, being two days after the first lease should expire; and by another indenture dated the same day and year, makes a third lease of the same lands to the same party, to commence such a day, being two days after the second lease would expire; and so betwixt each lease two days betwixt the beginning of the new lease and the end of the former; and if this was a forfeiture of his estate, because the custom of the manor warranted a lease but for a year only, was the question? And it was agreed, that whether the custom of the manor, or the general custom of the realm, allows a copyholder to make a lease for a year, this ought to be a lease in possession, and he cannot, after such lease made, make another in reversion; and these three leases being made all at one time, shall be intended one entire contract, and so a lease for three years, which is more than the custom warrants, and, consequently, a forfeiture: and the intervention of two days between each lease was but a fraud and covin to defeat the lord of his forfeiture, which shall not avail: and therefore it was adjudged against the copyholder, that he had forfeited his estate.

Cro. Jac.
308. Bulf.
215. Roll.
Abr. 507.
Lutterell
and Welton.

So, where a copyholder, who by the custom of the manor could make a lease for one year only, made a lease for a year excepting the last day of the year, & *sic de anno in annum*, excepting the last day of every year, during his own life; this was adjudged, by all

the court, clearly to be a forfeiture, and the exception of a day at the end of every year to be only a shift to evade the custom; which it cannot do; for it is a lease certain for two years at least, excepting two days, which in effect, is a lease for more than one year; and if he might by such exception of a day or two, at the end of two years, get out of the reach of a forfeiture, he might then make a lease for twenty years, or what other time he thought fit, which the law will not permit; and in *Bulf.* this manner of leasing appears expressly to have been by articles, by way of covenant, that he should have the land in that manner, not by words of immediate leasing, which make this a direct authority, that a covenant that he shall have or enjoy such lands, amounts to an immediate lease, and not a covenant barely; and though it were in case of a copyhold, yet it would not save the forfeiture.

So, if a copyholder makes a lease for a year, *Et sic de anno in annum* during ten years, this is clearly a good lease for ten years, and if not warranted by the custom, will be a forfeiture of his estate.

Roll. Abr.
508. *Bulf.*
190. *Cro.*
Jac. 301.
2 Mod. 81.

These cases being so adjudged, and that a copyholder cannot, either by way of covenant, or of executory and renewable leases annually, prevent the forfeiture of his estate, if he exceeds the number of years warranted by the custom, and has no licence from his lord for that purpose; let us see if there be any way yet found out to avoid this mischief, and yet make over to the lessee some certainty that he shall enjoy the lands after the term warranted by the custom is expired, without which few will care to take leases for so short a term as the customs of most manors generally allow; and we find one case where an attempt of this kind was made, and it seems to have succeeded accordingly: the case was this: A copyholder made a lease for a year only of his copyhold land, according to the custom, and covenanted that after the end of this year the lessee should have or enjoy the same lands for another year, and so *de anno in annum* for ten years; this was held by *Yelverton* Justice to be no such lease as would make a forfeiture, because he had a lawful estate but for one year only; and the court agreed with him herein; and this seems to be a very reasonable construction; for when he had in express terms leased it but for one year only, and after in the deed covenanted for the lessee's having or enjoying it for a longer term, this variation in the manner of expression must vary the sense of it likewise; for now it appears that he intended by the covenant something different from the lease itself, otherwise he would not have departed from that form of expression, which was the most proper and natural whereby to signify his intention of leasing; and then it would be unjust and unnatural to strain the covenant, which has a meaning proper and peculiar to itself, to signify the same with the first part of the deed, which varies not only in form, but was also intended to quite another purpose.

Cro. Jac.
301. *Bulf.*
190. *Lady*
Mount-
ague's case.

And perhaps in such covenant it may be still better if it were worded to *permit and suffer* the lessee to have, hold, and enjoy the lands in such manner; for a covenant in that form, even of free-

Roll. Abr.
848.
3 *Bulf.* 252.
2 Mod. 81.

hold lands, will not amount to an immediate lease, because the words *permit and suffer* prove that the estate is still to continue in him from whom the permission is to come; for if any estate thereby passed to the covenantee, he might hold and enjoy it without any permission from the covenantor; and therefore in such case the covenantee hath only the bare covenant for his security of enjoyment, without any actual estate made over to him.

Doe v.
Clare,
2 Term
Rep. 739.

[In ejectment for a copyhold, the defendant produced a paper-writing, written upon an agreement stamp, under the hand and seal of *T. Tidd*, of whom the lessor of the plaintiff purchased, made between *T. Tidd* and *T. Clare* (the defendant), reciting, that *M. S.* was seised of the premises in question for her life; and that *Tidd* had agreed with *Clare*, that *in case he should be seised of the premises on the death of M. S. he would immediately on her death demise and let them to Clare*, on the terms and conditions mentioned: "Now therefore the said *Tidd* doth hereby agree to demise and let unto the said *Clare* all, &c. and all such copyhold premises as he shall or may be entitled to on the death of the said *M. S.*, to hold from and immediately after the death of *M. S.* for the term of 21 years, at the yearly rent of 12 l. 12 s. And the said *Tidd* doth hereby promise and agree to and with the said *Clare*, that he the said *Tidd*, on the death of the said *M. S.*, and on his becoming entitled to the said premises, shall and will procure a licence to let the said premises." Lord *Kenyon* was of opinion, at the trial, that the instrument amounted to a lease, there being words of present demise contained in it, and therefore nonsuited the plaintiff. But on the motion for a new trial, his lordship said, that having consulted with the other judges, he was clearly convinced he was mistaken in the opinion which he had holden at the trial; and that they were all of opinion, that the instrument in question was an executory agreement only, and not a lease, for two reasons: first, because, if this were holden to be a lease, a forfeiture would be incurred; whereas that would be contrary to the intent of the parties, who had cautiously guarded against it by the insertion of a covenant, that a licence to lease should be procured from the lord: and secondly, the stamp is conformable to the nature of an agreement for a lease, and not to a lease itself.]

7. Of Leases made by Executors or Administrators.

Vide tit. Executors and Administrators.

Executors and administrators, as they may dispose absolutely of terms for years vested in them in right of their testators or intestates; so may they lease the same for any fewer number of years, and the rent reserved on such leases shall be affets in their hands, and go in a course of administration.

6 Co. 63.
67. b.
Sir Moyle
Finch's case.
Vide 5 Co.
29. Prince's
case.

So, where lessee for fifty years of a reversion expectant upon a lease for life makes his will in writing, and thereof appoints one *B.*, his son, an infant of three years of age, executor, and dies; administration is granted to *C. durante minori etate of B.* generally; then *C.* makes a lease for ten years, without reserving any rent,

for aught appears; yet this lease was held good, because, by the ecclesiastical law, *minor 17 annis non admittitur fore executor*; and therefore administration being granted generally during his minority, the whole term and power of disposing thereof, for that time, vests as absolutely in the administrator as it would have done in the executor himself, if he had been of an age capable of acting therein; because for that time the testator died *quasi intestatus*, and the administrator for that time hath the same power as if he had actually died intestate; and therefore such lease is good, at least till the executor attains his age of seventeen years, when such administration ceases: and some held, that such lease would hold good after, till the executor avoided it by actual entry, by reason of the general power which such administrator had in the mean time; and therefore such continuing acts are not *ipso facto* determined by the ceasing of the administration, but are only voidable in the same manner as other leases would be, *viz.* by an entry of the executor, when he comes to take upon him that office. But if the administration had been special, *ad opus, commodum, & utilitatem* of the executor during his minority, & *non aliter, nec alio modo*, as it was in *Prince's* case, then none could make title by virtue of such a lease made by such special administrator, even during the minority of the executor; for the nature and manner of the administrator's power appearing in the very title which the lessee must make to such lease, this lease would appear not to be pursuant thereto, because it could not be of necessity, nor for the use or advantage of the infant, since it could not take effect during the life of the tenant for life; and therefore such lease would be condemned as void presently.

8. Of Leases made by a Bailiff of a Manor.

A bailiff of a manor cannot, by virtue of his office, make leases for years; for his business is only to collect rents, gather the fines, look after the forfeitures, and such like; but he hath no estate or interest in the manor itself, and therefore cannot contract for any certain interest thereout. But the lord of the manor may give him a special power to make leases for years, as he may do to any stranger; and then such leases, if they are pursuant to the power, and made in the name of his lord, will be good as leases by the lord himself: for the bailiff, though he hath such power, cannot make them in his own name. But a general bailiff of a manor may make leases *at will*, without any special authority, because being to collect and answer the rents of the manor to his lord, if he could not let leases at will, the lord might sustain great prejudice by absence, sickness, or other incapacity to make leases, when any of the former leases were expired; and such leases at will are for the benefit of the lord, and can be no ways prejudicial to him, because he may determine his will, when he thinks fit.

But if a bailiff of a manor hath a special power to make leases for years, as he ought to make them in the name of his master, so they ought to be made in writing, that the authority may appear

Bro. tit.
Bailly, 40.
41. tit.
Leases, 37.
Cro. Jac.
99. Roll.
Abr. 339.

2 Chan.
Ca. 202.
Rothwell v.
Sir Charles
Hussey.

to

to be pursued: therefore, where a bailiff constituted by writing to receive rents, manage and let the lands, made a parol lease for eleven years, and the lessee, being turned out at law upon an ejectment, brought a bill for relief in Chancery, the bill was dismissed, because he had only a parol lease, which the bailiff had no power to make.

9. Of Leases made by a Guardian.

Lit. § 123,
124.
Co. Lit.
88, 89.
Vaugh. 18.

A guardian in socage may make leases for years in his own name, and the lessee may maintain ejectment thereupon; for this guardian is a person appointed, not by any special designation of the party, but by the wisdom of the law, in respect of the lands descended to the infant; so that where no lands descend, there can be no such guardian: and his office originally was to instruct the ward in the arts of tillage and husbandry, that when he came of age he might be the better able to perform those services to his lord, whereby he held his own land: and though the office now be in some measure changed, as the nature of the tenure itself is, since the time that the socage tenants bought off their personal labours and services with an annual rent to the lord, yet it is still called socage tenure, and the guardian in socage is still only where lands of that kind (as most of the lands in *England* now are) descend to the heir within age: and though the heir after fourteen may choose his own guardian, who shall continue till he is twenty-one, yet as well the guardian before fourteen, as he whom the infant shall think fit to choose after fourteen, are both of the same nature, and have the same office and employment assigned to them by the law, without any intervention or direction of the infant himself; for they were therefore appointed, because the infant, in regard of his minority, was supposed incapable of managing himself and his estate, and, consequently, derive their authority, not from the infant, but from the law; and that is the reason they transact all affairs in their own name, and not in the name of the infant, as they would be obliged to do, if their authority were derived from him: and if their authority were derived from him, it would by no means answer the intention of the law in appointing them; for then all acts done by virtue of such derivative authority could be of no more force than if done by the person himself who gave that authority, since none can communicate more power to another than he has himself; and that would invalidate all their contracts, and make them favour of the same imbecility as if made by the infant himself. Therefore, to enable them to take effectual care of the infant, and his affairs, the law has invested them, not with a *bare authority* only, but also with an *interest*, till the guardianship ceases; and to prevent their abuse of this authority and interest, the law has made them accountable to the infant, either when he comes to the age of fourteen years, or at any time after, as he thinks fit; and therefore their authority and interest extends only to such things as may be for the benefit and advantage of the infant, and whereof they may give an account;

account; which is the reason they cannot present to any benefice in right of the heir, because they can make no advantage thereof, (for that would be simony,) and, consequently, have nothing therein whereof they can give an account; and therefore the infant himself shall present thereto.

Vide tit.
Guardian.

From what has been said it appears, that a guardian in socage hath not only a bare authority, but an interest in the lands descended, and therefore, during that time, may make leases for years in his own name, as any other who hath an interest in lands may do; for he is *quasi dominus pro tempore*. And if he makes leases for years to continue beyond the time of his guardianship, such leases seem not to be absolutely void by the infant's coming of age, but only voidable by him, if he thinks fit: for they were not derived barely out of the interest of the guardian, or to be measured thereby, but take effect also by virtue of his authority, which, for the time, was general and absolute; and therefore all lawful acts done during the continuance of that authority are good, and may subsist after the authority itself, by which they were done, is determined; and consequently, the infant, when he comes of age, may by acceptance of rent or other act, if he thinks fit, make such leases good and unavoidable. But a guardian by (a) nurture cannot make any leases for years, either in his own name, or in the name of the infant, for he hath only the care of the person and education of the infant, and hath nothing to do with the lands merely in virtue of his office; for such guardian may be, though the infant hath no lands at all, which a guardian in socage cannot.

Bro. tit.
Garden, 19.
70. Cro.
Jac. 55. 98.
Shopland
v. Ridler.
2 Roll.
Abr. 41.
Brifden v.
Hussey.

(a) But
note, a testa-
mentary
guardian,
or one ap-
pointed pur-
suant to the
statute 12
Car. c. 24.
is the same
in office and
interest with
a guardian
in socage.
Vaugh. 179.

A. lets land to B. for four years, and the lands being holden in socage, and the heir under fourteen, the guardian in socage by an indenture, before the first lease was expired, lets the same lands in his own name to B. for eight years; and if by this acceptance of a new lease from the guardian in socage the first lease was surrendered, was the question? and it is said to be holden by the court, that it was surrendered; or, if it could not be properly called a surrender, for want of a reversion in the guardian in socage, yet they held, that at least the first lease was thereby determined by admittance of the lessor's power to make such present lease, which, if the first should stand in the way, he could not do; and a guardian in socage hath power to make leases for years. Though this case is cited in (b) *Hutton* to be no surrender, yet it was in a case, where the question was of a surrender strictly and properly so called; and therefore though it were not to be cited for an authority of a surrender properly so called, yet it might amount to a determination of the first lease, which in the principal case, all the court agreed that it did: but they held, it would be otherwise in case of such lease made by a guardian *pur nurture*, for he can only make leases at will; and therefore such second lease at will must be absolutely void, when the lessee was in possession already by virtue of a lease for years.

Leon. 153.
322.
4 Leon. 7.
Owen, 45.
56. Willis
and White-
wood.

(b) *Hutton*,
105.

If a woman, who is guardian in socage to her son, marries again, and the husband and the join in a lease of the infant's lands, this lease, upon the death of the husband, becomes void; for the interest

Plow. 203.
Osborne's
case.

terest which she had in the lands was in right of the infant, and therefore shall not bind her, as those acts shall in which she joins with her husband in parting with her own possessions.

10. Of Leases made pursuant to Authority.

Roll. Abr.
330. 9 Co.
76. b. 77.
Cro. Eliz.
115.
Moor, pl.
1196.

If one hath power, by virtue of a letter of attorney, to make leases for years generally by indenture, the attorney ought to make them in the name and style of his master, and not in his own name: for the letter of attorney gives him no interest or estate in the lands, but only an authority to supply the absence of his master by standing in his stead, which he can no otherwise do than by using his name, and making them just in the same manner and style as his master would do if he were present: for if he should make them in his own name, though he added also, by virtue of the letter of attorney to him made for that purpose; yet such leases seem to be void, because the indenture being made in his name, must pass the interest and lease from him, or it can pass it from no body: it cannot pass it from the master immediately, because he is no party; and it cannot pass it from the attorney at all, because he has nothing in the lands; and then his adding by *virtue of the letter of attorney*, will not help it, because that letter of attorney made over no estate or interest in the land to him, and, consequently, he cannot, by virtue thereof, convey over any to another. Neither can such interest pass from the master immediately, or through the attorney; for then the same indenture must have this strange effect at one and the same instant, to draw out the interest from the master to the attorney, and from the attorney to the lessee, which certainly it cannot do; and therefore all such leases made in that manner seem to be absolutely void, and not good, even by estoppel, against the attorney, because they pretend to be made not in his own name absolutely, but in the name of another, by virtue of an authority which is not pursued. This case therefore of making leases by a letter of attorney, seems to differ from that of a surrender of a copyhold, or of livery of seisin of a freehold, by letter of attorney; for in those cases when they say, *we A. and B., as attornies of C., or by virtue of a letter of attorney from C., of such a date, &c., do surrender, &c., or deliver to you seisin of such lands*; these are good in this manner, because they are only ministerial ceremonies or transitory acts *in pais*, the one to be done by holding the court rod, and the other by delivering a turf or twig; and when they do them as attornies, or by virtue of a letter of attorney from their master, the law pronounces thereupon as if they were actually done by the master himself, and carries the possession accordingly: but in a lease for years it is quite otherwise, for the indenture, or deed alone, convey the interest, and are the very essence of the lease, both as to the passing it out of the lessor at first, and its subsistence in the lessee afterwards: the very indenture, or deed itself, is the conveyance, without any subsequent construction or operation of law thereupon; and therefore it must be made in the name and style of him who has such interest to convey, and not in the name of the attorney,

9 Co. 76,
77. Combe's
case.

attorney, who has nothing therein ; but in the conclusion of such lease it is proper to say, *in witness whereof A. B. of such a place, &c. in pursuance of a letter of attorney hereunto annexed, bearing date such a day ; or if the letter of attorney be general, and concern more lands than those comprised in the present lease, then to say, in pursuance of a letter of attorney, bearing date such a day, &c., a true copy whereof is hereunto annexed, hath put the hand and seal of the master, and so to write the master's name, and deliver it as the act and deed of the master ; in which last ceremony of delivering it in the name of the master by such attorney, this exactly agrees with the ceremony of surrendering by the rod, or making livery, by a turf or twig, by the attorney, in the name or as attorney of his master ; which proves that there is a great diversity between using the name of the attorney in the making of leases, and using his name in making a surrender of copyhold, or livery of seisin of a freehold estate.*

The king, by letters patent, gave authority to his surveyor to make such leases of such lands, reserving the ancient rent, and the surveyor makes leases by indenture between the king *ex una parte*, and *J. S. ex altera parte*, and the indenture *testatur quod dominus rex dimisit, &c.* and the conclusion was, *in cuius rei testimonium the surveyor sigillum suum apposuit* : the court held these leases to be void, because not pursuant to his authority ; for a bailiff cannot make leases in his own name, though it be but *de anno in annum*, and of lands usually let, but he ought to make them in the name of his master ; so here the surveyor ought not to have put his own seal to the lease, but the seal of the king, for without the king's seal it cannot be his lease ; and the manner of pleading such lease proves this, for the words are ; *quod dominus rex per A. B. sigillum suum apposuit* ; and a great case was cited, where such lease by a bailiff, in his own name, was held to be void.

Moor, pl.
191.
Dyer, 132.

In ejectment the case was, that one *A.* devised lands to *B.* his son in tail, with divers remainders over, and makes one *C.* overseer of his will, and willed that he should have the education of his son till he came to the age of twenty-one, and to receive, set, and let, for the said *B.*, the said lands so given him, and thereof to account to the said *B.*, being allowed his charges, &c. *C.* makes a lease for seven years in his own name, with reservation of rent to himself ; and this lease by computation, was to continue half a year after *B.*'s attaining his full age ; and if this lease was good for any part of the term, was the question ; *C.* being dead, and *B.* not yet of age ? and it was argued to be good for the whole term, or at least during the minority of the son, and only void for so much as exceeded the full age of the son, and that *C.* had an interest in the land, and not a bare authority only ; for then all leases must have been made in the name of the infant, and so he might avoid them whenever he thought fit, which the testator never intended to empower him to do. But *Popham, Clench, and Fenner* held that, as this devise is, *C. was but a guardian for nurture*, and could not make leases at his own will and pleasure ; for then he might make them

Cro. Eliz.
678. 734
Piggot v.
Garnish.

them for one hundred years; but here he can only make leases at will, for there is no other time certain appointed, and he is but in the nature of a bailiff, and accountable; and therefore it was adjudged that the lease was void. From this case it appears, that if the authority had been sufficient to enable him to have made leases for years, such leases made by him during the continuance of that authority would not have determined therewith, but should have subsisted during the whole term for which they were made; and the infant in such case could not, when he came of age, have avoided them, as he may leases made by his guardian in focage, if he thinks fit, because the lessee would have been in by the will and devise, not by the guardian *pur nurture*, admitting the authority or devise had been sufficient for that purpose, which in none of the following cases of devises it seems to be.

Moor, 774.
Yelv. 73.
Carpenter
and Collins.
Dyer, 26. b.

One devises land to his son when he comes to the age of twenty-four years, and in the mean time that his executor shall have the oversight and dealing of all his lands and goods: this gives the executor no interest to make a lease certain for years, but only an authority to oversee and order the land in right of the son, and for his use and benefit, as wanting discretion to manage it himself; but the whole estate remains in the mean time in the son by descent, and the executor can only make leases at will; for there is no express devise to him of the lands till the son comes to twenty-four, nor any express authority to make leases for years in the mean time; and the heir shall not be disinherited, though but for a time, without a manifest intent in the will to that purpose. And where in that case, the son died before he came to twenty-four years of age, it was held, that whether the devise gave the executor an interest or an authority only, yet it determined by the death of the son, whenever that happened; for it was only affixed to his care of the son, and, consequently, determined by his death, and was never intended to exclude the next heir till the son should or might have attained his age of twenty-four years; and then the executor having power to make leases at will only, the next heir may, whenever he thinks fit, determine them by entry, or otherwise.

Cro. Eliz.
190.
Parker and
Plummer.
Cro. Eliz.
252. Smith
v. Havens.
Hob. 285.
Balder v.
Blackbourn.
Dyer, 210.
Pl. 24.

But if the words of the will had been that the executor should have the land, or the profits of the land, to his own use, without account, till the son should come to twenty-four, provided, or to the intent that he should bring up and educate his child or children; this would not only amount to a trust and confidence in the executor, but would also fix such an interest in him for answering the purposes of the will, as would go to his executors, though he should die before the son attained the age of twenty-four years; and the education of the child, or children, is no such matter of privity or confidence, but that another may do it as well; and, consequently, in this case, such executor may make leases for years, till the son should or might attain to the age of twenty-four years; and this would not determine, though the son should die before that age, till by computation of time he might have attained that age, if he had lived.

One devised lands to his wife *de anno in annum*, till his son should come to the age of twenty-one years: this was by all the justices held such an interest as would determine by the death of the son, though before twenty-one; for the intent was only that his wife should have the lands during the minority of the son, by reason of his supposed incapacity to manage them during that time, which reason is at an end by his death: and this the rather appears to be his intent by the words *de anno in annum*, which are executory and applicable to each single year, and shew his caution, not to give it to his wife for any determinate number of years, lest his son should die in the mean time, whose death, or attainment of twenty-one years, he intended should be the determination of the wife's interest. But by *Dyer*, it would have been otherwise, if the words had been, *till the son should or might come to that age*; and therefore this case differs from *Boraston's* case, and the other cases, which were adjudged, upon a special reason, that for payment of debts, or for the support and provision of the devisee or executrix, or for maintenance of his children generally, where he had several; there in such cases, though the son to whom it was devised at such an age should die before that age, yet the executrix, or devisee, should have such an interest vested in them for those purposes, as should not determine till the son should or might have attained that age, if he had lived; and, consequently, such executrix, or devisee, may make leases for years, which shall continue as long as their own interest therein.

Moor, pl.
143. 3 Co.
19, 20.
Boraston's
case. Chan.
Ca. 114.
2 Chan.
Rep. 136.

11. Of Leases made pursuant to Powers in private Conveyances and Settlements.

As in the settlements of estates in families, it is usual to limit but estates for life to the present takers, to prevent their power of alienation and defeating their issue of the provision intended them by such settlements; and yet it is necessary the land comprised in such settlements should be continued in the occupation and manurance of tenants and farmers, who, being skilled in the arts of husbandry, know best how to improve and manage them to advantage; therefore, to encourage the industry of such farmers, it is become customary to empower the tenants for life to grant leases for a certain time, which otherwise they could not do, having themselves but an uncertain interest determinable on their deaths. It will therefore be necessary to consider these kind of leases, and how far their pursuing or deviating from the several powers whereon they are founded will invalidate them, and how far not; as also upon what sort of settlements such powers may be reserved, and what not.

1 Burr. 120.
Vide ante the
case of Orby
and Lord
Mohun,
letter (E);
[and note,
that the
rules of law
adopted in
cases of ec-
clesiastical
leases, and
of leases
made by
tenant in
tail under
the statute
of 32 H. 8.
apply equally
to leases made by virtue of powers in
settlements.]

Tenant for life, upon a settlement made 12 *Fac.* 1. had power to make leases of all or any of the lands which at any time heretofore have been usually demised or let in possession for three lives, or any number of years determinable on three lives, or for twenty-one years, or under, reserving the rent thereupon now yielded or paid, or more, so long as the lessees, their executors

Vaugh. 28
to 35.
2 Jon. 27
to 37.
Tristram v.
Viscountess
Balsinghams.

and

and assigns duly pay the rents, and perform the conditions, according to the true meaning of their indentures of lease. The tenant for life makes a lease of several parts of those lands, for years determinable on three lives, so long as the lessees, their executors and assigns, duly pay the rents, &c. (*verbatim* as in the power), reserving the same rents which were reserved 12 *Jac.* 1. when the settlement was made, and specifying particularly what those rents were; and there being other lands, called *Lofield*, which were found not to have been in lease since 12 *Eliz.* (when they were let for twenty-one years at 100*l.* *per ann.* rent), he now leases those lands for twenty-one years, rendering 100*l.* *per ann.* rent, and with the same clause as in the other, *viz.* so long as the lessees, their executors and assigns, duly pay, &c. The rents due at *Mich.* for the lands in the first lease were found to be in arrear, but paid in a month after; and the rent upon the lease of *Lofield* was duly tendered, but not received; and before the next rent-day the defendant, as heir at law in remainder, entered, upon whom the lessees re-entered to maintain their leases, &c. 1. It was agreed, that the limitation in the several leases, so long as the lessees, their executors and assigns duly pay, &c. was well warranted by the power being *in terminis* the same with the power, and therefore was good. 2. That by non-payment of the rent at the days, the leases were determined, so that no acceptance after could save or set them up again. 3. It seemed to be agreed that the first lease was good, because expressly found, that the rents reserved were the same as were reserved 12 *Jac.* 1. and that necessarily implies that those lands were then in lease, and being ancient lands, they shall be presumed to have been usually demised; and the rather, because no doubt was made of this at the trial. But 4. It was adjudged that the lease of *Lofield* was not warranted by the power; 1. Because the qualifications annexed to the power of leasing shew, that land not so qualified was not to be leased: now the land to be leased by virtue of this power, was such as had been actually let, which must be twice at least; but *Lofield* appears to have been let but once; therefore not within the power: also, *usually* may signify the common continuance of land in lease; as land leased for 500 years long since is land usually demised, though it were demised but once; but then the words, *at any time*, shew that it must be of lands which had been usually at all times let, which *Lofield* was not, being out of lease for above twenty years before the settlement: but chiefly and lastly this lease was adjudged void, because the power was to make leases, reserving the rent thereupon now yielded or paid, *viz.* at the time of the settlement; and this land not having been leased for twenty years before, could be under no reservation of rent at that time, and, by consequence, the rent thereupon then reserved (which was none) could not be reserved upon any after-lease to be made: and the words (*or more*) will not hold, because they are words of relation, and must refer to some rent before, which here was none at all: besides, *more* or *less* are words of comparison, and comparatives necessarily suppose a positive; but nothing or no
rent

rent is a mere privative. And yet the objection against this construction seems considerable; for it was said, that the words (*at any time heretofore usually demised*) imply that some lands were not then in lease; therefore the clause of reserving the rents, which were then yielded and paid, must extend only to the rent of such lands as were then in lease, and not of the others, which were not then in lease: yet since he had a power of leasing them, if they had been at any time theretofore usually demised, he might lease them, reserving what rent he pleased; and so is one (*a*) book expresses in point as to the reservation: but the difference between that case and this is, that there the power was to let all or any the lands generally, without any restraint; whereas this is restrained to lands *usually* letten, which, as appears afore, this of *Loffield* was not, having been let but once; and therefore the very power of leasing fails as to that; otherwise the reservation of a rent, though none was reserved before, seems no great objection against the lease: *ideo quare?*

A settlement was made to the use of *A.* for life with remainders over, provided that the tenant for life may make leases of the premises, or any part thereof, so as upon every lease there be reserved 5 s. an acre for every acre of the land or premises so demised: the tenant for life leases a rectory, (which was not included within the settlement, and consisted only of tithes, without any glebe,) reserving rent, or without any rent at all reserved; and if this were a good lease within this power was the question? It was argued not, because construction is to be made upon the whole clause, and the latter words, which appoint the reservation of 5 s. rent for every acre of land, shall restrain the general import of the word *premises* to land only, which can only consist of acres; otherwise it may as well be said, where a power is to make leases, so as the ancient rent be reserved, that you may, by virtue of this power, lease lands which were never before demised, and that the words *ancient rent* shall only be applied to the lands which had been anciently or usually demised. But it was answered and resolved by the court, that this lease was within the power, and so would a lease of land, not usually demised, in the case before put; for the power being general and affirmative at first to make leases of all or any part, the restraint which comes after under the *so as, &c.* shall be extended no farther than the very words themselves import, that is, in the one case, to so much an acre for that which consists of acres, and in the other, to the ancient rent for that which was anciently or usually demised. And this resolution was founded chiefly on *Cumberford's* case, where the power was to make leases of all or any part, so as such rent, or more, were reserved upon every lease as was reserved within the space of two years before; and a lease was made of part of these lands which had not been demised within two years before; and it was resolved to be a good lease, and that he might reserve any rent he pleased, because the power was general to lease all; and therefore the restrictive clause should be applied only to such lands as had been demised within two years before: but *Hale*, in the principal case, said, if

(a) 2 Roll.
Abr. 262.
Cumber-
ford's case.

Vent. 294.
2 Lev. 150.
3 Keb. 544.
5: 7.
Walker and
Wakeman.

2 Roll.
Abr. 262.

it had been *res integra*, he might perhaps be of another opinion. Note also, this case seems against the case of *Vaugh.* 35, before.

Goodtitle v.
Funucan,
Douglt. 565.

[Lord *Ferrers* was tenant for life under a settlement, in which there was the following power, *viz.* "That it should be lawful
" for the tenants for life respectively, from time to time, and at
" all times during their respective natural lives, and when they
" shall respectively come into, and be in, *the actual possession of the*
" *aforsaid manors and premises*, by virtue of the limitations afore-
" said, by indentures under their hands and seals, to demise all
" or any of the said manors, messuages, lands, tenements, and
" hereditaments hereinbefore mentioned, or any part thereof, to
" any person or persons whomsoever, in possession, but not by way
" of reversion or future interest, for the term of twenty-one years
" absolute, or any less absolute term; or for any term or number
" of years determinable upon one, two, or three lives, so as upon
" every such lease or leases respectively, there be reserved and
" made payable during the continuance of such lease or leases
" respectively, to be incident to, and go along with the imme-
" diate reversion or remainder of the premises so leased, so much
" or as great yearly rents as, or more than now is, and are paid
" and yielded, or agreed to be paid and yielded for the same, or
" proportionably for any part thereof." Lord *Ferrers*, under this
power, granted a lease to the defendant for ninety-nine years, if
he should so long live. Part of the premises comprised in the
lease, consisted of manors and manerial rights which had never
been leased before, and also of a fishery which had been let be-
fore, but was not at the time of the settlement. Since that time,
it had been let again at 15 s. It was objected, that the manors
and fishery were not demisable under the power. The manors
had never been let; the fishery was not let at the time of the set-
tlement; and the power required the rent then paid, or *more*, to
be reserved. Things then for which *no* rent was *then* paid, could
not be meant to be comprehended. This would avoid the whole
lease; for one entire rent was reserved, and it could not be appor-
tioned. But, by the count, the power is express to demise the
manors and fishery. They are particularly mentioned in the set-
tlement, and the power goes to the whole. They pay under this
lease as great a yearly rent, as at the time of the settlement, for
they paid nothing then. The words, therefore, are complied
with, and this objection could only stand upon *intent*. But no
such *intent* appears. The manors are nominal,—of no value,—
no object of yearly income; the fishery worth only 15 s. a year.
They are convenient to the lessee living on the land, and of no use
to the remainder-man. The intent was to give leave to demise
all, reserving as much rent in the whole, as had been reserved be-
fore. Besides, the words at the end of the power, "or propor-
" tionably for any part thereof," shew that it was the intent that
the *quantum* of the rent, and not any particular part of the pre-
mises included in the settlement, was to guide the person in exe-
cuting the power.

3 Term
Rep. 677.

A., tenant for life under a settlement, in which there was a power, that any person who should be actually seised of the lands by virtue of the settlement might make a lease or leases for three lives, or for twenty-one years, of all or any part of the premises therein comprised, *at such yearly rents, or more, as the same were then let at*, granted a lease of the capital messuage for twenty-one years, but reserved no rent. The question was, whether the capital messuage was demisable under this power? and the court held, that it was not. For the qualification annexed to the power of leasing, that *the ancient rent must be reserved*, manifestly excludes the mansion-house, and grounds about it, *never let*. No man could intend to authorize a tenant for life to deprive the representative of the family of the use of the mansion-house; therefore, the words in such a case shew, that the power was meant to extend only to what had been usually let. By that means the heir enjoys all the premises in the settlement, just as they were held and enjoyed by his ancestor, the tenant for life. He has the occupation of what was always occupied, and the rent of what was always let. The nature of the thing spoke the intent as forcibly as the most direct words would have done. It was demonstration.

Bagot v. Oughton, 3 Mod. 249. 381. Foist. 332.

Dougl. 574.

So, where a tenant for life under a will, with a power to let *all* or *any part* of the premises, *so as the usual rents* be reserved; and so as there should not be at any one time any greater or larger estate upon any one *tenement*, or part of a tenement so leased, than for three lives, or for ninety-nine years, determinable on lives, either in possession or reversion; and so as such lease or leases should not be made dispensible of waste; granted a lease of *tithes which were never leased before the making of the will*; the court held that such lease was not warranted by the power, and therefore void. It was most manifestly the intent of the deviser, that nothing should be let, but what had been let before; that those who were to enjoy the estate after him, were to enjoy it in the same manner as he had done. In all cases on the construction of powers, the single point to be considered is, the intention of the creator of the power: that alone must govern.]

Pomeroy v. Partington, 3 Term Rep. 665.

[1 Burr. 120.]

If land hath been leased, by virtue of a contract, from year to year, for three years, this cannot be said to be usually let, because this is but one lease, though renewable every year.

2 Roll. 262.

[Lands were conveyed on a marriage to trustees and their heirs, to the use of one for life, remainder to his first and every other son in tail male, &c. with a proviso, "that it should be lawful for the tenant for life, and his wife, during their respective lives, and the son and sons of their respective bodies, and the heirs male of such son and sons, and the heirs male of tenant for life, as they should be severally and successively in possession of the freehold by virtue of the limitations aforesaid; and for the said trustees, and the survivors and survivor of them, and the heirs of such survivor, *during the minority* of any such son or sons, or issue male, at any time or times, by any deed or deeds to be signed and sealed by him or them respectively, in

Right v. Thomas, 3 Burr. 1441. 1 Bl. Rep. 446.

" the presence of two or more credible witnesses, to demise, lease,
 " &c. to any person, &c. either in possession or reversion for one
 " life, or for two or three lives, &c. all or any part of the pre-
 " mises which *had been usually so demised and letten*, so as there
 " should be no more than three lives in being at one time," &c.
 A lease was afterwards made by indenture, &c. bearing date the
 24th of June 1742, between the trustees named in the settlement,
 (there being then a minority,) and J. S., of part of the premises,
 in consideration of a fine paid, a certain yearly rent, and a specific
 sum for a harriot. Several old leases of the premises were shewn,
 some in Queen Elizabeth's time, and others in that of Henry 8th;
 some for years, and others for ninety-nine years, determinable
 upon three lives: and among the rest, an indenture *tripartite* bear-
 ing date the 15th of December 1638, whereby one of the ancestors
 of the present tenant for life, seised in fee, in consideration of na-
 tural love and fatherly affection to his second son, and for his
 better advancement, livelihood, and maintenance, covenanted to
 stand seised to the use of himself for life, then of his second son,
 his executors, &c. for ninety-nine years, if his said son, or any
 woman he should marry, or any issue of his body, should so long
 live, paying unto the heirs and assigns of the father the yearly rent
 of 4 *l.* payable quarterly; with covenants on the part of the son to
 pay the rent, and repair the premises. The question was, whether
 a covenant to stand seised could be considered as an evidence of
 the usual manner of demising? And by the court, it should.
 There is no doubt, but that these lands had been usually leased for
 lives; and the usual profits made by fines. A covenant to stand
 seised entered into by the owner of an estate, is a *lease*: and the
 objection, that the covenant to stand seised in question is by way
 of provision for a younger child, is of no weight; for it is every
 day's experience; nothing being so common as the making of
 these leases for the benefit of younger children.]

Co. 134. a.
 139.
 Popb. 81.
 8 Co. 71. a.
 And. 273.
 Harcourt
 v. Poole.
 2 Roll.
 Abr. 261.
 2 Jon. 35.

If a feoffment in fee be made to the use of *A.* for life, remainder
 to *B.* in tail, with power for *A.* to make leases reserving, or so that
 he reserve the accustomed rent, payable to all those who shall
 have the reversion or remainder; if *A.* make leases accordingly,
 these leases derive their essence out of the feoffment, and after they
 are made do, in point of time, precede all the other estate limited
 by that feoffment; so that the rent thereupon reserved, shall go,
 with the reversion or remainders thereby limited, as a rent properly
 so called, and not as a sum in gross; and therefore those in re-
 version or remainder may distrain, or have an action of debt for
 recovery of it, as if they were seised in fee, and had made such
 lease. And where one (*a*) book calls it a sum in gross, this is
 denied to be law in (*b*) another, and several books prove it a rent.
 But in (*c*) *Popb.* it is said to have been a doubt, in the Lord *Dyer's*
 time, if such leases should be good, unless there were a clause,
 that the feoffees, and their heirs, should stand seised to the use of
 such lessees; for which reason it may not perhaps still be amiss to
 insert such a clause, though such leases have ever since been held
 to be good without such clause; for since the same deed that
 limits

(*a*) Co. 139.
 (*b*) In 2 Jon.
 35, for
 which is
 cited And.
 273.
 2 Roll.
 Abr. 261.
 (*c*) *Popb.* 81.

limits the estates to *A.* and *B.* gives *A.* power to make leases for such a determinate time, these leases cannot be derived out of the interest of *A.*, for that being but for his own life, is not commensurate to such leases, which at all events are to last for such a time; and if such leases were to determine at *A.*'s death, the power would be nugatory and idle, because without it he might have made such leases; but the power being to make leases which shall endure longer than the life of *A.*, these leases, when they are made, must be derived out of the same root as the estate of *A.* himself is, that is, out of the estate of the feoffees, who for that purpose have a kind of *scintilla juris* left in them to serve such future leases when they are made, and by consequence, must be seised to the use of such lessees; and then the statute of 27 *H. 8. c. 10.* presently carries the possession accordingly; and the power, being coeval with the other estates, may well subject them to the execution thereof; since he who is master of his own estate, may dispose of it upon what terms he thinks fit.

But these leases can only be made by virtue of such powers upon estates executed by transmutation of possession: therefore, if one bargains and sells lands to another by indenture enrolled for the life of the bargainee, with power for the bargainee to make leases for three lives, or twenty-one years; yet this is of no effect to give him any such power; for here is no transmutation of the possession at law, but only a use raised by virtue of the consideration, to which the statute immediately carries a possession, according to that use; but for the residue of the estate, it continues wholly in the bargainor, as it was before; and then the persons who are to be the lessees being unknown, no consideration can arise from them to the bargainor, and by consequence, no other use can then be drawn out of him. And if the use does not arise at the time of the bargain and sale, it can never arise after; because when the deed is once perfected, its operation, as to creating any new or further interest, is then at an end, and consequently, no leases can be made upon such a conveyance, for want of a consideration to raise a use to the lessees.

So, if one covenants to stand seised to the use of himself for life, remainder to his wife for life, with divers remainders over, with a power for the covenantor, for divers good causes and considerations, to make leases for lives or years, &c. this power is perfectly void, so that he cannot by virtue thereof make leases, even to his sons or daughters, or any other of his blood, much less to strangers; because such general consideration can raise no use at all, and no averment of a particular consideration can help it, because his intent appears to be general, with regard to the persons to take such leases, as to the consideration whereon they are to be made; for his intent then was not to demise to one person more than to another; and since such leases are to arise and take their effect out of the estate of the covenantor, there must be a consideration to raise a use for that purpose at the time of the covenant made; which in this case there cannot be, *when neither the persons nor the consideration are known*: and if there be no con-

Poph. 81.

Mildmay's
case.
Co. 176.
Moore, 144,
372.
2 Koll.
Abr. 260.
Crofts v.
Fausten-
ditch, Cro.
Jac. 180.
Baynes v.
Beison.
Raym. 247.
3 Keb. 809.

sideration to raise such use at the time of the covenant perfected, it can never arise after, because the further operation of the deed then ceases. But upon a *feoffment*, *fine*, or *recovery*, where the estate is *executed*, and a change of the possession made presently, there, no consideration is requisite to raise any of the uses; and then, by virtue of the power which is created at the same time with the conveyance itself, the lease may be made at any time after.

Chan. Ca.
101. 263. 4.
Prince and
Green v.
Chandler.
40 Eliz.
3 Chan.
Ca. 91.
[Lord C. J.
Treby, in
his argu-
ment in
Bath and
Montague's
case, assigns
the same
reason for sup-

And yet where one covenanted to stand seised to the use of himself for life, remainder to his eldest son, with power for himself to lease a small part for forty years, which he accordingly afterwards did, for a provision for a younger child; though at law this was not good, yet the Lord Chancellor *Egerton*, upon a bill in Chancery, decreed relief, because the son claimed by the same conveyance by which the power was limited, and the conveyance was intended to have been by livery, but that the father was advised such covenant to stand seised would do as well; and the law in *Mildmay's* case was not then adjudged; so that neither the party nor his counsel did then know but that such power was warranted by law.

porting the lease.]

Godb. 327.
Pl. 419.

A husband seised of lands in right of his wife, he and his wife levy a fine to the use of themselves for their lives, and after to the use of the heirs of the wife; proviso, that it shall and may be lawful to and for the said husband and wife, at any time during their lives, to make leases for twenty-one years, or three lives; and the wife being covert, made a lease for twenty-one years: it was adjudged a good lease against the husband, though made when she was a feme covert, and although it was made by her alone, by reason of the proviso. This is the case *verbatim*, as it is put in the book: but surely the reporter must be mistaken; for, as it is put, there appears no power for the wife solely to make leases, but only in conjunction with her husband; therefore the power must be intended for the wife solely, or for the husband and wife, *or either of them*; and then, no doubt, such lease by the wife alone will bind the husband, because it takes its essence *out of the fine*, to which both were parties and consenting.

Bayley v.
Warburton,
Com. Rep.
494:

[One seised in fee, on his marriage with a second wife, settled lands on himself for life, then on his wife for life, then on the issue of that marriage, then to the use of his eldest daughter by his former wife, and to the heirs of her body, &c. There was a proviso, that it should be lawful for the wife, *during her life*, to demise the premises to any person for such term, with and under such conditions, rents, and reservations, in such manner to all intents as tenant in tail may do by statute 32 H. 8. for the term of one, two, or three lives, upon and under such reservations and rents, and in such manner as tenant in tail was enabled to do by that statute. The husband died, and the wife married again, and she and her second husband demised the premises pursuant to the power. Two questions were made; first, whether the lease made by the husband and wife, when the power was given to the wife alone, were a good execu-
tion

tion of the power, or whether it were not suspended by the marriage? Secondly, whether this lease by the husband and wife ought not to have been made by fine? As to the first question, the court held, that this was a good execution notwithstanding the power. As to the second, that no fine was necessary; for the estate of the lessees was not derived from the lessors, but arose out of the estate of the feoffees or releasees named in the original settlement: that therefore, nothing more was requisite to the raising of an estate to the lessee, than what was required by the deed creating the power; which was only an indenture signed by the party making the lease, and made in such manner as the 32 H. 8. requires in leases by tenant in tail.]

A., seised of a reversion in fee expectant upon an estate for life to *B.*, covenants to levy a fine, &c. to the use of himself for life, remainder to the use of himself in tail, &c. with power to *A.* to make any lease or leases in possession or reversion of all or any the premises, provided that such lease or leases do not exceed three lives at the most, or twenty-one years, and so as the accustomed rent be reserved, payable during such lease or leases: a fine is levied accordingly: then *A.* makes a lease to *C.* for ninety-nine years, if two lives should so long live, to begin after the death of *B.*, rendering 14 *l.* per annum (the ancient rent) to him, his heirs and assigns, and to such person and persons to whom the inheritance shall after his death appertain; and if this was a good lease, pursuant to his power, was the question? It was adjudged that it was: because the first part of the power was to make leases absolutely and indefinitely, in possession or reversion, and the restraint which came after was only that they should not exceed three lives, or twenty-one years, which this lease does not; for though it is for ninety-nine years, yet it is determinable on two lives, which is less. Besides, the power being to make leases as well in reversion as in possession, and for lives as well as years, could not have been executed, as to making leases for lives, in any other manner; for they could not be made for lives in reversion, as they may for years determinable on lives; and a lease in such manner was most consonant to the nature of his estate, which was but a reversion after the estate for life to *B.* But the court agreed, that if one hath power generally to make leases for three lives, he cannot make a lease for ninety-nine years, if three lives so long live; for this is not pursuant to his power, which was only to make leases for three lives; and there being no other liberty given in the power, he cannot vary from it, because such powers being to charge the inheritance of a third person, are to be taken strictly. 2. It was adjudged, that the reservation was good, because such lease, after it is made, comes in by virtue of the power above all the limitations, and takes its essence, not out of the estate for life, but out of the estate of the conusees before all the other estates, and then they coming in after, in the nature of reversions, the reservation to them is good.

It was said by the judges, in 3 *Keb.* that the construction in *Whitlock's case*, that a person, having power to make leases for

8Co. 69, 70.
2 Roll. Abr.
260. Whit-
lock's case.
3 Mod.
268-9.
Lutwich
v. Pigott.

3 *Keb.* 746:

three lives, could not make a lease for ninety-nine years determinable on three lives, was too nice, and expressly contrary to the intent of the parties.

Mich. Yet in a late case, where *A.* made a settlement, and limited the estate to himself for life, remainder to his son *B.* for life, with several remainders over, with a power to *B.* when he came into possession, *to assign or limit the same to any woman that he should marry, or for the use or in trust for her*, in lieu of her jointure; *B.* on his intermarriage, by deed reciting his power, demised the estate to trustees for ninety-nine years, in trust for her, if she should so long live: though it was agreed, that this was no greater estate than by the power he was enabled to make, being to determine on her death, and that an estate for years was, in the eye of the law, of shorter duration than an estate for life; yet it was resolved, that the power being positive, and specifying what estate was to be limited, ought to be construed and pursued strictly, being to arise out of the estate of a third person (*a*): and they agreed the rule laid down in (*b*) *Whitlock's* case, that all positive particular powers must, in all material circumstances, be positively and particularly pursued.

he decreed the defendant to pay all the costs both at law and in equity. 2 Burr. 1147. 2 Vez. 644. And note, in the case of *Zouch v. Woolston*, 2 Burr. 1147. the court of King's Bench were of opinion, that whatever is an equitable, ought to be deemed a legal execution of a power.] (*b*) 3 Co. 70. Ley. 74. Co. 45. S. Rule laid down.

3 Keb. 44. One had power in effect to make leases for the lives of *A.*, *B.*,
Alfop v. and *C.*, and he makes a lease to them for three lives, and the life
Pine. of the longer liver of them: this was held to be sufficient within
the power, because for three lives generally, and for three lives
and the longer liver of them, is all one, since without such words
it would have gone to the survivor.

2 Bull. 216. Tenant in fee makes a lease for life, and after levies a fine to
Cro. Jac. the use of *J. S.* for fifteen years, remainder to the use of himself
147. Roll. for life, with power for himself to make leases for twenty-one
Rep. 12. years, or three lives in possession; and the question was, if by
2 Roll. virtue of this power he might make leases during the continuance
Abr. 260. of the term for fifteen years, or not till after that was ended? and
Fox v. *per curiam* clearly, he may make leases presently in possession; for
Prickwood. the power issues out of the whole estate, and by virtue thereof he
may make leases in possession presently, and need not stay till
the term end, or the lands come into possession; and the
termor shall have the rent reserved thereon: and they agreed, that,
as this power was, he could not make leases in reversion, but the
term of fifteen years was immediately subject to the power, and
when that is executed it will charge the possession.

Palm. 46. Tenant for life, with power to make leases for twenty-one
Cro. Eliz. 5. years, rendering the ancient rent, makes a lease for twenty-one
6 Co. 33. years, to begin such a day after: this is not pursuant to the power,
Leon. 35. and consequently void, because *pro tempore* it is a future lease,
3 Leon. 130. which this power does not warrant, but it ought to be made in
4 Leon. 64. possession; for if he might make leases in reversion, or *in futuro*,
Moore, 19. though but a month after, he may as well make them to begin
Feph. 6. twenty
Yelv. 22.

twenty years after, or after his death, and so defeat the intent of the power, which being to charge the estates of third persons, is to be taken strictly.

But where a husband, seised of lands in right of his wife, made a lease for twenty-one years pursuant to 32 H. 8. c. 28. and after, by a private act of parliament it was enacted, that the husband should have those lands for his life, remainder to his wife for life, and that all leases and grants thereof made or to be made by the husband for three lives, or twenty-one years, reserving the ancient rent, should be good; and the husband after made a lease of these lands, to begin after the expiration of the first lease; it was held good; for the lands being in lease at the time of the making of the act, the intent of the act seems to warrant such lease in reversion, and the rather, because there was no restraint from making leases in reversion, as there is in 32 H. 8. c. 28. which seems implicitly to give a power of leasing them in reversion: but they agreed, that if the lands had not been in lease at the time of making the act, or if a lease had been made in possession pursuant to the act, the husband could not in either of these cases have made a lease in reversion, or to begin at a future time; because then the power might well be executed by making leases in possession, which here, having but a reversion himself, he could not. It was also held, that a commission from the queen to make leases for twenty-one years, to save her the trouble of making them, would not warrant leases in reversion.

[So, tenant for life of the reversion of lands that were in lease for lives, by virtue of a power under a settlement, (providing "that it should be lawful for every person who should be actually "seised of the freehold of the premises limited in use, to make "leases of any part thereof which had been usually letten for lives "or years, of which he should be so actually seised by virtue of "the limitations aforesaid, by indenture, for any term not exceeding twenty-one years, or determinable on one, two, or three "lives, &c. so as there were not in any part of the premises so "leased at any one time, any more or greater estate or estates "than for twenty-one years or three lives, or for any number of "years determinable upon three lives,") made several leases for ninety-nine, to commence from the death of a remaining life in a former lease. And the question was, if these leases were pursuant to the power? It was objected, that they were leases in reversion. But it was answered, that when a man made a settlement of the *reversion* of lands *demised* for life or years to the use of one for life, with power to make leases *generally*, he may make a lease during the continuance of a former lease, to commence after the former, as otherwise his power would be ineffectual.

However, where C. under a power to make leases for one, two, or three lives, or for twenty-one years, reserving the ancient rent, demised to B. for twenty-one years, to commence after the death of I. and M., who were tenants for life at the time of making the settlement, and who lived for several years after; it was holden, that

Cro Jac.
318. 2 Roll.
Abr. 261.
Raym. 247.
Dyer, 357.
Leon. 36.
3 Leon. 71.
4 Leon. 66.
2 Roll.
Abr. 261.

Coventry v.
Coventry,
Com. Rep.
312.

Baynes v.
Belson, Sir
T. Raym.
247. But
this case did
not receive
a decision,

but was adjourned, other questions arising therein. And it is observable, that the court are stated by the reporter, to have founded their resolution on this point on the case of *Slocomb v. Hawkins*, as reported in *Yelverton*, 222., and on that of *Suffex v. Wroth*, as cited 2 Roll. Abr. 261. and 6 Co. 33., both of which cases, as cited in the reporters referred to, apply only where reversionary leases are made under a power attaching upon estates in *possession*. Pow. on Powers, 419.

2 Roll. Abr. 261. *Hele v. Green*, adjudged on a special verdict. One possessed of a manor for ninety-nine years, by his will devises it to *A.* his wife for her life, with power to let, set, or make estates out of it, and that in as ample manner as I myself might, if I were living; and after the death of *A.* he devises it to *B.* his daughter, and the heirs of her body begotten, and dies, and *A.* being his executrix, consents to the devise, and after makes a lease of part of the said manor to *C.* for ninety-nine years, if three lives so long live, and dies: this was adjudged a good lease against *B.* the daughter; though it was objected, that she had power to dispose of it only during her own life, because otherwise she might defeat the remainder limited to the daughter. But the court held, that the disposition made by her should continue after her death, otherwise the power would be merely idle, since without it she might have disposed of it during her own life.

Lev. 176. Sid. 260. Raym. 132. Keb. 778. 910. *Opey v. Thomas*; & vide Chan. Ca. 17. One seized of lands in fee makes a lease for ninety-nine years, if three lives should so long live, and after settles the reversion on himself in tail, with power to make leases for one, two, or three lives, or for twenty-one years in possession; and after he makes a lease for twenty-one years, to begin after the expiration of the first lease; and if this was pursuant to his power, was the question? And the court agreed, that where tenant in possession makes a settlement with power to make leases generally, there, he can only make leases in possession; but where he that makes the settlement had only a reversion at the time, there, he may make leases out of that reversion; for that agrees with the intention of the parties, which is to be the guide in the construction of all such powers: but here, the power being expressly to make leases in possession, this lease, which was of the reversion only, is not within the power, as the court seemed to agree; though it was urged, that a lease *in presenti* of the reversion was consonant to the intent of the parties, and such a lease in possession as the nature of his estate would admit of; *ideo quare?* And note, the case of *Slocomb* and *Hawkins*, as it is reported in *Cro. Jac.* seems to impeach the diversity agreed on by the court; for there it is put, that tenant in fee of a manor, which was then in lease for years, levies a fine thereof to the use of himself for life, remainder to his eldest son in tail, with power for the tenant for life to make leases at any time for twenty-one years; and before the first lease expired the tenant for life made a lease for twenty-one years, to begin after the determination of the first lease, and died; and though the settlement itself was of a reversion, and the power general, yet this lease in reversion was adjudged void; for that, as the court said, it ought to have been a lease in possession: but *Yelverton*, who reports the same

same case, mentions it as a settlement of lands in possession, and that the tenant for life made a lease for twenty-one years, and after, before the expiration thereof, made another lease for twenty-one years, to begin after the expiration of the first lease; and this second lease was adjudged clearly void, and contrary to the meaning of the power.

Devisee for life, with power to make leases for twenty-one years, whereupon the old accustomed yearly rent shall be reserved, makes a lease for twenty-one years, under the old rent, &c. and a year before the expiration of that lease he makes a lease to another for twenty-one years, *to begin presently*: this lease seems to be good within his power as a concurrent lease, because it is no charge upon the reversion, nor is there any more than twenty-one years *in toto* against the reversioner; but this power would not warrant the making of leases in reversion; for then he might charge the inheritance *ad infinitum*.

[Lord *Ferrers* was tenant for life under a settlement in which there was a power, for the tenants for life, *respectively*, when they should respectively come into and be in actual possession of the premises settled, by indentures under their hands and seals, to demise all or any of the said premises, or any part thereof, in possession, but not by way of reversion or future interest, &c. Part of the premises subject to the power were let by the agent for the tenant for life by agreement in writing, from the 15th *March* 1775, to occupy till the 10th *March* 1776, to three persons, and the rest was at the time of the lease in the occupation of tenants at will. Afterwards, on the 17th of *August* 1775, Lord *Ferrers*, by indenture, reciting the power, demised part of the premises to the defendant for ninety-nine years, from *Lady-day* then last, if she should so long live, at the yearly rent of, &c. It was objected to this lease upon motion for a new trial, (the defendant, the lessee, having gotten a verdict in ejectment brought by the remainderman to recover the premises leased,) that it was a lease in reversion, and therefore, contrary to the power and void; for it was contended that Lord *Ferrers*, at the time of this demise, could not grant an immediate lease in possession, because part of the premises were then let, under an express agreement, for a term, of which several months were then to run; and though the rest was stated to have been in the hands of tenants at will, yet, as the law then stood, they must be considered as tenants from year to year, and entitled to six months notice. Lord *Ferrers*, it was insisted, could not have brought an ejectment against any of them at the time of the demise, and therefore had no immediate possessory right; such right, and the right to recover in ejectment being convertible. It made no difference to this question, that the subsisting leases were not by deed, since a parol lease for three years, or less, was equally effectual with a lease by indenture; and the court could not draw the line, and say, that a lease granted under a power like the present, should be good although there was a subsisting term of *seven months* at the time of granting it; but should be void if there was a subsisting term for *seven years*; the legislature only, or the parties could

Icon. 147-
S. Read
and Nash.

Goodtitle v.
Funucan,
Doug. 565.
See the
power at
large *supra*
146.

could draw such a line. Sir *Orlando Bridgman*, the father of conveyancers, and who probably invented these powers, laid it down, it was said, that all leases, where there was a particular estate out, were leases in reversion. And the interposition of the legislature in 4 *Geo. 2. c. 28. § 6.* to enable landlords to renew leases for lives, although the under-tenants should not likewise surrender, corroborated this doctrine. But it was answered by the other side; first, that the tenants assented to this lease, and surrendered their possession before the execution of it, in order to make it valid. This had been expressly left by the judge to the jury, who found that the defendant was in possession at the time of the execution. Secondly, that if the jury had not found the lessee to have been in possession, *still this would be good as a concurrent lease*: for this *Read v. Nafib* was cited, and the reason there given for supporting the lease was said to be a strong one; namely, that the inheritance was not charged in the whole with more than twenty-one years. No authority, it was said, had been cited against this case, nor any answer given to the reasoning in it. Thirdly, that, in respect of the power, all the subsisting leases were leases at will; there was no outstanding lease as against the remainder-man; he would not have been bound to give the tenants notice to quit, but might have entered upon them immediately; for, except in the case of leases under the power, (and these were not in many respects according to it,) the possession would devolve upon him the instant of the death of the tenant for life. And for these reasons, the court unanimously held the lease to be good, notwithstanding this objection.]

9 Co. 76. a.
Roll. Abr.
330.

Tenant for life, with power to make leases for three lives, or twenty-one years, cannot make such leases by letter of attorney, by virtue of his power; because such leases not being derived out of the interest of the tenant for life, but by an authority derived from the tenant in fee, and to charge the estate of third persons, the trust for that purpose is personal, and cannot be delegated to another.

Noy, 66.
Cook v.
Bromchill.

A. makes a lease to *B.* for life, and after levies a fine to the use of *C.* for life, remainder to himself in fee, with a proviso or power to make leases for twenty-one years, or three lives, and that the devisees should stand seised to such uses; afterwards *A.* covenants to stand seised to the use of *D.* in tail, with divers remainders over, and after grants the reversion aforesaid to *E.* for life, who distrains *B.* and avows; and judgment was given against the avowant; because by the covenant to stand seised, &c. *A.* had destroyed his power of making leases, and, by consequence, the grant to *E.* not being derived thereout, could not affect any of the preceding estates.

1 Chan. Ca.
23. Pawcy
and Bowen.

One hath power to make a lease for ten years, and he makes a lease for twenty years; yet in equity this is good for ten years, and so it has been settled several times.

Chan. Ca.
10. Pollard
v. Greenwill.

One having power to make leases for twenty-one years in possession, made a lease to *A.* for twenty-one years in trust for the payment of debts; but the lease was made to commence from a time

time to come, and so not pursuant to the power; yet, being made for the payment of debts, was supported in equity.[†]

[Tenant for life of estates situate in *Ireland*, with full power of making leases for any term not exceeding thirty-one years or three lives, to commence in possession, at the best improved rent that could be had for the same, made a lease “from the date for and during the “natural life and lives of three persons and the longest liver of them, “or, for the term, time, and space of thirty-one years, to commence “from the date, which should last longest, from thenceforth next ensuing, fully to be complete and ended.” On an ejectment brought, in the court of Exchequer in *Ireland*, by the heir at law and remainder-man, and a special verdict returned thereon, the question was, whether this lease was good within the terms of the power? On argument before the barons, it was adjudged that it was good, which judgment was affirmed on a writ of error in the Exchequer-chamber there, before the Lord Chancellor of *Ireland*, assisted by Lord Annaly, the Chief Justice of the court of King’s Bench, the constituent members of that court. But Lord Annaly having delivered his opinion for reversing the judgment, a writ of error was brought in parliament. It was there argued on the part of the remainder-man, that the lease was bad, for that it was in manifest opposition to the power; because, instead of being a lease for one or other of the terms expressly, as the power directed, it was a lease for the one or the other as chance should direct; and that he, being a purchaser for the most valuable of considerations, had a clear right to exact a strict performance of the condition annexed to his father’s power of leasing. But it was contended on the other side, that, in cases of this kind, all a remainder-man could reasonably expect was, that an estate, when it came to him, should not be charged beyond what it was the intention of the settler to allow those who stood before him to charge it. That it would not be so by the lease in question, if it were construed as a good lease for three lives, and no longer. That courts of law, who, in modern times, had adopted the same rules of construction which prevailed in courts of equity, in the construction of powers and of the instruments by which they were executed, would, when they had been exceeded, correct the excess, and support the execution so far as it was warranted by the power. That the lease in question, so far as it was a lease for three lives, was clearly warranted by the power; and this was apparently the primary object of the parties. Besides this, they had a second object in view, which was to secure the estate to the lessee for thirty-one years, in case the lease for lives should determine sooner. But this, whether it was considered as concurrent or contingent, was not warranted by the power.—The lease was adjudged good; and the judgment affirmed.]

If one makes a feoffment in fee to the use of himself for life, with power to demise, lease, grant, or devise the lands for three lives, or twenty-one years, yet this gives him no other power in effect than to limit the use of the land for three lives, or twenty-one years; for all leases to be made by him by virtue of such power

Commons
v. Mar-
shall, 7 Br.
P. C. 114.

Moor, 514.
611. 645.
2 Lev. 147.
Vent. 231.
1 Keb. 512.
accord. that
it is the best

way to make
no livery ;
but Hale
thought it
no forfeit-
ure, because
by the seal-
ing of the
deed the
lease takes
effect, and
then the
livery comes
too late.

power take their essence out of the original feoffment : therefore, if he makes a lease for three lives, and makes livery of the land, this is a forfeiture of his own estate for life ; because he himself being only tenant for life, cannot out of that estate make such leases ; and when he takes upon him to make livery of the land, he takes upon him to make the lease as owner of an estate sufficient for that purpose, which he is not ; and to make such leases no livery is requisite, because they taking effect out of the first feoffment, the livery made upon that is sufficient to supply all the future limitations to be made in pursuance thereof. But if he pursues the words of the power, and says only, *I demise or lease such lands to you for three lives*, this is sufficient, and will be taken in execution of the power a good lease for three lives. So, if he only says, *I limit the use to you for three lives*, &c. this likewise is sufficient, because this in effect is the substance of his power, and the statute presently carries the possession after such use. So, if one hath power only to limit new uses, and he gives or devises, &c. the land itself, this is also good, and enures to a limitation of the use, because the use is but an equity to have the land itself, and when he gives, demises, or devises the land itself, he also gives all his use and equity therein, and then the statute executes the possession accordingly.

Carth. 427-
3. 2 Salk.
517. pl. 1.
5 Mod. 244.
378. Ld.
Raym. 267.
Comyns, 37.
pl. 25.
Winter v.
Loveday.

It was found by a special verdict, that *A.*, being seised of the manor of *M.*, did, on his son's marriage, settle the same to the use of himself for life, and after to the use of his wife for life, then to the son in tail; with the following proviso or power ; *viz.* *That it should be lawful for the said A. during his life, and for his wife, after his death, during her life, by deed indented to make leases, either in possession for the term of one, two, or three lives, or for the term of thirty-one years, or for any other term or terms, number or numbers of years, determinable upon one, two, or three lives, or in reversion for one or two lives, or for thirty years, or for any other term or number of years, determinable upon one or two lives ; so as such demise be not made of any the ancient demesne lands, parcel of the said manor, or of any other lands which for the space of seven years have been used as demesne lands, and so as the ancient rent be reserved ; afterwards A. by deed makes an absolute lease for thirty years of copyhold lands, parcel of the same manor, which were in the tenure of J. S. for the term of two lives, to commence after the two lives then in being. And in this case it was held by Holt, Chief Justice, Turton and Eyre Justices, contra Rokeby, 1. That a lease of copyhold lands was not warranted by the power, being within the exception of ancient demesne lands, all copyhold lands being ancient demesne, it being an inseparable quality of every copyhold, that it was time out of mind parcel of the manor. 2. It was held by the said justices, against Rokeby, that a lease for thirty years absolute in reversion after two lives, might be made by *A.* or his wife of any lands which were in their power of leasing ; and herein Holt held, that a lease to commence at any day to come, is properly a lease in reversion ; but in this case it signifies a lease to commence after some interest in being at that very time when the lease in reversion was made ;*

made; that this power to lease for life in reversion must be taken to be a lease of the reversion itself, and not a concurrent lease, and that it cannot be otherwise, because a freehold cannot commence *in futuro*; and where there is a power given to make leases in possession and reversion, in such case if a lease is made in possession, and afterwards some life drops, he cannot make a new lease in reversion of the same lands, because his power is executed by making the first lease: that where a qualification is annexed to a power of leasing, which, if observed, goes in destruction of the power, the law will dispense with such qualification; as where there is a power to make a lease of a manor, or of any part thereof, so as the ancient rent be reserved, yet he may by this power make a lease of the services, parcel of the manor, upon which no rent can be reserved; otherwise the express power would be defeated.

A man made a voluntary settlement on his son for life, and after to his first and other sons in tail, with power to the son to make a lease in possession for ninety-nine years, determinable on three lives, and also to make leases for sixty years, to commence after his death, if he had issue male, to continue so long as he had issue male: the son makes a lease to his father in trust for one of his younger children, but the lease was not pursuant to the power; yet it was decreed good, and taken to be a lease made by the father after a voluntary settlement.

[The Duke of Montague was tenant for life, without impeachment of waste, with power to lease "reserving ancient and accustomed rents, heriots, boons, and services," under which power he granted several leases. In the former leases, the tenants covenanted "to keep in repair:" in those granted by the duke that covenant was omitted. The Lord Chancellor, after taking some days to consider of it, was of opinion, that that covenant was a boon, and beneficial to the remainder-man; and held these leases void for want of it. He said, that he was clear upon the argument; but he took time, because there was no case in point. The more he thought of it, the more he was convinced. The principle he rested upon, was, "that the estate must come to the remainder-man in as beneficial a manner, as ancient holders held it."

Under a power requiring the best rent that can be reasonably gotten, to be reserved payable during the term, there must be a covenant for payment; for under a mere reservation, it is not payable till entry; and therefore, in fact, may never be payable during the term. Besides, if there be no covenant to pay the rent, the lease may be assigned to a succession of beggars. There must also be a clause of re-entry; else the ground may be unoccupied without any, or at least a sufficient distress upon it, so that the remainder-man can neither have his rent nor his land. The want of a counterpart too is an unusual omission, and very prejudicial.

But if the covenants be upon the whole such as leave the parties on the same footing as under former leases, their differing in trifling circumstances will not be material. Thus, it was objected

Abr. Eq.
342.
Gooding v.
Gooding.

Earl of Cardigan v.
Montague,
6th June
1765, cited
in 1 Burr.
122.

Taylor v.
Hord,
1 Burr. 125.

Pow. on
Powers,
579.
Goodtitle

v. Funucan,
Doug. 505.
supra, 146.

to the covenants in the lease from Earl Ferrers to Mrs. Funucan, (by one of which she covenanted, that she would pay half the land-tax, amounting to 7*l.* 10*s.* by the other of which the earl covenanted for himself, his heirs, &c. to free her from tithes and from levies and payments to the church,) that the covenants in the lease were not so beneficial to the remainder-man, as those in the ancient leases; for that in the former leases, the tenants covenanted to pay all duties and taxes, except the land-tax; that church dues were particularly, by law, chargeable on the occupier; but by that lease the landlord covenanted to free the tenant from tithes and all levies and payments of the church. The new covenants were therefore less beneficial to the remainder-man, than those in the former leases. By the court.—The power made no mention of covenants. The ground, therefore, must be, that the present covenants were a fraud on the power, by lessening the value of the reservation; but on considering them fully, it appeared, that what is thrown on the landlord was compensated by what was paid by the tenant. She was to pay half the land-tax. As to the church-dues, the covenant seems to be collateral, and not to go with the land, or to bind the remainder-man, resembling a covenant for quiet enjoyment. But if it did go with the land, there was no pretence of fraud on the power; the 30*l.* were, *bonâ fide*, reserved as an ancient rent. What was stipulated with regard to tithes was of no consequence, since none were payable.

Doe v.
Sandham,
1 Term
Rep. 705.

As under a power to lease *reserving the usual covenants*, the omission of a usual covenant will vacate the lease, so the introduction of an unusual covenant in such case will have the same effect. Thus, where a tenant for life made a lease under a power in those terms, containing a proviso, “that in case the premises were blown down or burned, the lessor, or the persons who for the time being should be entitled to the freehold and inheritance, should re-build, otherwise the rent should cease,” the lease was adjudged to be void; the jury having expressly found such covenant to be unusual.

Lord Mans-
field, Burr.
124.

It is no objection to a lease under a power “that it is in trust for him who executes the power,” provided the *legal* tenant be bound, during the term, in all requisite covenants and conditions.]

(K) By what Form of Words Leases may be made.

HERE it may be laid down for a rule, that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for such a determinate time, such words, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose: and on the contrary, if the

most proper and authentick form of words whereby to describe and pass a present lease for years, are made use of; yet if upon the whole deed there appears no such intent, but that they are only preparatory and relative to a future lease to be made, the law will rather do violence to the words, than break through the intent of the parties: for a lease for years being no other than a contract for the possession and profits of the lands on the one side, and a recompence of rent or other income on the other, if the words made use of are sufficient to prove such a contract, in what form soever they are introduced, or however variously applicable, the law calls in the intent of the parties, and models and governs the words accordingly.

My Lord Coke tells us, that the words *demise, grant, betake*, and *to farm-let*, and whatever other words amount to a grant, may serve for a lease for years. Co. Lit. 45. b. 2 Mod. 250.

So, he says, *dedi* is a sufficient word to make a lease for years. Co. Lit. 301. b.

But there are several other words which are equally sufficient to make a lease for years; therefore in case of the king, if he makes a lease for years, under the Exchequer seal, in these words; *sciatis quod nos commissimus custodiam* of such land to such a one, this is a good lease, and the lessee may plead it as a demise or lease of the land itself; for this sufficiently shews the intent of the king to part with the possession of the land for the time, and therefore amounts to an effectual lease; and this being the usage in the Exchequer, all other courts are bound to take notice thereof. Bro. tit. Leases, 71. 4 Inst. 111, 112. Co. Lit. 45. b. 2 Co. 17. a.

So, if one only licence another to enjoy such a house or land till such a time, this amounts to a present and certain lease or interest for that time, and may be pleaded as such, though it may be also pleaded as a licence; and if it be pleaded as a lease for years and traversed, the lessee may give the licence in evidence to prove it. 5 H. 7. 1. Leon. 129. 3 Bulf. 252. Sid. 428. Mod. 14. 2 Keb. 561. 2 Lev. 194. 3 Keb. 761. Hard. 366.

[So, where the owner of a house and brew-house, entered into partnership, and assigned one-fifth, and covenanted that the partner should reside in the house, &c. it was holden, that he could not maintain an ejectment against the partner contrary to his own agreement. Besides, that as a licence to inhabit, it amounted to a lease.] Right v. Proctor, 4 Burr. 2208.

So, if *A.* by articles covenants with *B.* that he shall have or enjoy such land for such a time, this is a good and effectual present lease, because here are sufficient words to prove a contract, that the one shall relinquish the possession, and the other come into it. But if the covenant had been with *B.*, that *C.* a third person should have or enjoy such lands of *A.* for such a time, or that the executors of *B.* should have or enjoy it for that time, this would be no lease to *C.* or the executors of *B.*, but only a bare covenant with *B.*: for when these words have their natural and binding force as a covenant with *B.*, they cannot at the same time have a different construction, and amount to a lease to *C.* or the executors of *B.*, who are strangers to the contract and no parties to the deed, and when those executors of *B.* are not yet Leon. 136. 303. Cro. Eliz. 1. 173. Owen, 97. Roll. Abr. 847. 3 Bulf. 252. Fitz. tit. Affize, pl. 412.

in esse; neither can these words amount to a lease to *B.*, because the intent is manifest that he himself is to have nothing in the land, but is only a trustee of the covenant for *C.* or his executors: And further, if these words should amount to a lease to *C.* or the executors of *B.*, when they came *in esse*, this would take off from their operation as a covenant with *B.*; for the same words cannot at the same time have two different constructions and operations; and it cannot be said they are a covenant with *B.* by the first words; and a lease to *C.* or the executors of *B.* by the last words; for that *C.* or the executors of *B.* shall enjoy the land, is the very explanation of the covenant with *B.*, and gives life and force to it, and without that he covenants with *B.* for nothing; for till these words are added, the covenant with *B.* is but a dead letter, and has no meaning or sense in it.

Bro. tit.
Leases, 20.
30. 60.
Noy, 14.
Cro. Jac.
42. 659.
Palm. 201.
Leon. 118,
119.
3 Bull. 257.
Cro. Car.
207.
Jon. 231.
Hob. 35.
Moor, 861.
2 Brownl.
23. Roll.
Rep. 397.
3 Bull. 204.
Roll. Abr.
847.
Yelv. 85.
Brownl. 136.
Cro. Eliz.
223. Bro.
tit. Leases,
21. only
cont. per
Fincux.

So, where one by articles covenants, grants, and agrees with *J. S.* that he shall have such lands, or have, hold, and enjoy such lands for so many years, these are words sufficient to shew a present contract for the lessee's enjoying of these lands, and therefore amount to a present lease of them as effectually as if there had been the words *dimisit*, *locavit*, or such like: and though there were in the same articles a covenant to make a good and perfect lease, as counsel should advise, yet that would not prevent or destroy the operation of the first words as a present lease; such covenant only being *in majorem cautelam*, that the lessee might require further assurance by fine, or the like, if he found it necessary. And the difference is, where such articles, by way of covenant, are made by him who is owner of the lands; and where they are made by a stranger, or one who has then nothing in the lands: in the first case, they amount to a present and absolute lease; but not in the other, because a man cannot be supposed to lease what he has not: or if it might be so supposed, yet when it appears in the very articles that he has nothing in the lands, his covenant then can have no other construction, but that he will procure the owner of the lands to permit the covenantee to hold and enjoy those lands; which is the proper and natural interpretation of the words of the covenant, when he himself has nothing whereof to make a lease.

Cro. Eliz.
233.
Leon. 104.
Trustee and
Yewer.
2 Keb. 268.

A controversy was between two persons touching a lease for years, which of them had title to it, and they submitted to the award of *J. S.*, who awarded that one of them should have the land; this was held to be a good gift of the interest of the land, that is, an award, that the whole lease, or interest in the land for the term then to come, belonged to one, exclusively of the other. But if the award had been, that the one should permit the other to enjoy the term, this, it is said, would not have given him the interest in the land, nor would amount to a lease; that is, as I suppose, because the permission being to come from the other party, the interest must be supposed to be and continue in him; and therefore it could not amount to a lease, or an award of a lease: not to a lease, either from the arbitrator or the other; not from the arbitrator, because he had nothing in the land, and

was only to award what the other should do; not to a lease from the other, because it was only the act and award of the arbitrator: neither could it amount to an award of a lease from the other, because it was only that he should permit the other to enjoy the term, which he might do without making a lease; and the words being spoken by the arbitrator, who was a third person, cannot have the same operation, as if they had been spoken by one who had interest in the lands, but must be taken according to the literal sense and meaning thereof.

Articles indented in writing were made between *A.* and *B.* in this manner: *Imprimis*, it is covenanted and agreed between the parties, that *A.* doth let such lands for and during five years, to begin at *Mich.* next following, under 10*l.* a-year rent; or provided that the lessee shall pay 10*l.* at *Mich.* and *Lady-day*, by even portions, during the term: also the said parties do covenant, that a lease shall be made and sealed, according to the effect of these articles, before the feast of *All-Saints* next ensuing: this was held to amount to an immediate lease, by reason of the first words in the present tense, and that the last words were only for making such a lease in writing for further assurance; and the rather here, because the lease to be sealed was to be made after the beginning of the term.

Cro. Eliz.
486. Moor,
pl. 638.
Roll. Abr.
847.
2 Roll.
Abr. 449.
Paim. 201.

One said to another, “*you shall have a lease of my lands in D.* for twenty-one years, paying therefore 10*l.* per ann., make a lease in writing, and I will seal it:” this was agreed by all the justices to be a good parol lease for twenty-one years, though no writing was made of it, (being before the statute of frauds,) for the intent of the parties was sufficiently expressed, and the making of it in writing was but for further assurance, and left to the lessee, if he thought it necessary.

2 Bendl. 7.
Moor, pl.
31. Cro.
Eliz. 33.
306.

One made his will in this manner: “*I have made a lease to J. S. for term of twenty-one years, paying but 20*s.* rent:*” this was held a good lease or devise by the will for twenty-one years, and that the word *have* should be taken in the present tense, as *dedi* is in a deed of feoffment, to comply with the intent of the testator.

2 Bendl. 34.

[On the 28th of Nov. 1760, *John Abraham* and *P. Lloyd* entered into an agreement (stamped with a two shillings and sixpenny stamp) with the defendant *Browne*, whereby they agreed, “with all convenient speed to grant to him a lease of, and they did thereby set and let to him,” the premises in question, to hold for twenty-one years, at the rent of 290*l.* per ann. payable half-yearly “to the lessors:” the lease to contain the usual covenants, and certain special ones, in one of which the words “*this demise*” occurred. The defendant entered in pursuance of the agreement, and paid rent up to the 1st of March 1774. The court held, that this was a good lease *in presenti*, with an agreement to execute a more formal and perfect lease *in futuro*. The operative words *let* and *set* are in the present tense. A reference is also made to *this demise*. There have been fourteen years uninterrupted occupation under it, and five or six of them since the title of the lessor

Baxter v.
Browne,
2 Bl. Rep.
973.

of the plaintiff accrued. He has accepted rent, and thereby given the defendant every reasonable hope of acquiescence. Under such circumstances, if the words of this lease can import an *immediate* legal demise, the court will support it as such; and that they will, is evident from the cases cited, viz. 1 Roll. Abr. 847. *Moor*, 459. *Noy*, 57.

Bury v.
Nugent,
5 Term
Rep. 165.
in error
from Ire-
land.

In ejectment, the lessor of the plaintiff derived title from the defendant under an instrument, purporting to be a demise for twenty-one years of the premises in question. The instrument was as follows: "Be it remembered that *J. B.* (the defendant) hath let, and by these presents doth demise, &c. unto *R. F.* &c. for twenty-one years to commence the 5th of *May* or 1st *November*, whichever first happens after the said *J. B.* recovers the said lands from *M. O.* The said *R. F.* covenanting and agreeing on the foregoing conditions to pay *J. B.* 100 *l.* yearly and every year during the said term, &c.; leases with power of distress, and clauses for re-entering, and all other clauses usual between landlord and tenant, to be drawn and signed at the request of either party as soon as *J. B.* recovers the said lands from *M. O.*" *J. B.* recovered the lands from *M. O.* and was then in possession of them. The court were clearly of opinion, that the instrument operated as a present demise, and that the agreement for a more formal lease was merely in further assurance.]

Where
words of
covenant,
&c. will
not, in the
case of co-
pyholds
amount to
a lease so as to work a forfeiture, *vide supra*, under leases made by copyholders.

But now, on the contrary, if the most proper form of words of leasing are made use of, yet if, upon the whole deed, there appears no such intent, but that it is only preparatory and relative to a future lease to be made, the law will rather do violence to the words, than break through the intent of the parties, by construing a present lease, when the intent was manifestly otherwise.

Noy, 128.
Sturgeon
v. *Painter*.

Therefore, where articles were drawn between *A.* and *B.* in this manner: Articles agreed upon, &c. *Imprimis*, *A.* doth demise such a close to *B.* to have it for forty years, and a rent reserved, with clause of distress, &c. In witness whereof, &c. and afterwards there was written in the same paper a memorandum, that these articles are to be ordered by counsel of both parties, according to the due form of law: here, because the intent of both parties appeared by that memorandum, and by a lease actually drawn by counsel, but never sealed, (upon some disagreement between the parties,) it was ruled by the court, upon evidence in ejectment, that these articles were not a sufficient lease, and the jury found accordingly; and yet here was the form and words of a present and immediate demise or lease.

Roll. Abr.
348. Plea-
zance and
Higham.
2 Mod. 81.

So, where articles of agreement are drawn between *A.* and *B.* in this manner: first, the said *A.* is contented to demise such lands, &c. to the said *B.* from *Mich.* next for six years; and after these words, the rent reserved is 100 *l.* per ann. a re-entry for non-payment of the rent, a covenant for reparations, and a covenant to do such other things; and these articles are sealed and delivered by

by the parties: yet they do not amount to a lease, but are only preparatory covenants or instructions towards a lease, and never were intended to have the force or effect of a lease themselves; besides that, the word *contented* imports only an approbation of something to be done after. This case is cited in (a) *Cro. Jac.* in this manner: that if one covenants and grants with another that he shall *have and hold* such lands for ten years, that this is a good and absolute lease for that time; but if he covenants and grants that he shall *enjoy* those lands for ten years, this is no lease, because it sounds only in covenant. *Quere* of the difference between *holding* and *enjoying*, for there seems none; therefore the case must be mistaken.

[On the trial of an ejectment the defendant produced in evidence a lease, as he stated, of the premises in question, but which appeared to be an agreement upon paper, *unstamped*, and not under seal, between the Earl of *Abingdon*, under whom the lessor of the plaintiff claimed, and the defendant's father. In the subsequent part of it were these words, *viz.* "And further the said Earl of *Abingdon* doth hereby agree to let, and the said *Richard Way* agrees to rent and take for the term of seven, fourteen, or twenty-one years, in case the said Earl shall so long live, at and for the rent of 1400 *l.* a year, to be paid half-yearly, (the said Earl to pay or allow all manner of tithes and taxes, both ordinary and extraordinary,) all his estate, &c. at *Rycot*. It is agreed the said *Richard Way* shall enter on all the said premises immediately, but not commence payment of rent until *Lady-day* next. It is further agreed, that leases with the usual covenants shall be made and executed by the parties on or before *Michaelmas* next." On the production of this it was contended, that this being produced as a lease, and not being stamped, could not be read in evidence; and the judge being of that opinion, the plaintiff had a verdict. But on a motion for a new trial, the court were of opinion, that it was *not* a lease. The case in *Noy*, 128. of *Sturgeon v. Paynter*, they said, is in point. In the present case, there is also an express stipulation that leases *should be* drawn before *Michaelmas*: therefore, it plainly was not the intention of the parties that such agreement should operate as a lease, but only that it should give the defendant a right to the immediate possession, till a lease could be drawn. Had it been a lease, the court thought it ought to have been stamped (b).

Articles of agreement were drawn in the following manner: "Articles of agreement between *T. S.* and *D. J.*, entered into in regard to his fulling mills, dry-salting mills, and other conveniences for carrying on the said trades: that the mills and conveniences, with the islands and acre of land mintsfeet, called *Ashacre*, he shall enjoy, and I engage to give him a lease in, for the term of 31 years from *Whitsuntide* 1784, at the rent of 110 *l.*: and that I will purchase one yard in breadth to be laid to the *Race* from the *High Clews*, the length of *Charles Close*: and that if it be bought, &c." Here, though the words *shall enjoy* are sufficient to give the legal interest, yet the latter words restrain

Goodtitle
v. Way,
1 Term
Rep. 735.

(b) So now
if only an
agreement
under
23 G. 3.
c. 58.

Roe v.
Ashburner,
5 Term
Rep. 163.

their operation, and clearly shew it was the intent of the parties, that there should be some *further* assurance. It was in *feri* at the time: and if a bill had been filed in a court of equity for a specific performance of the agreement, that court would not have told the party that he had a legal and executed contract, but would have decreed a lease according to the agreement. By the subsequent part of the agreement, the landlord was to acquire an additional piece of ground to be laid to the mill, without which the lease was not to be granted: this shews that there was to be some future instrument to give title to the party.]

Dyer, 150.
Co. 155.
Hob. 35.
Moor, 480.
Roll. Abr.
248.
Bendl. pl.
115.

One made a lease for life, & *provisum est*, that if the lessee die within sixty years, that then his executors and assigns should enjoy the land in his right for so many years as should be behind of the sixty years from the date of the lease: this was held to be only a covenant, and no lease, for which there are divers reasons assigned in the books; as first, because the words purport an agreement, and not a grant, and so sound only in covenant, which is a very unintelligible reason. Another reason given is, because if it should be construed a demise, it must be void, because there is no person *in esse* to take it; for the executors are not *in rerum natura*. Another reason given is, because nothing of the said term was given to the lessee himself for life, as remainder to him and his executors for sixty years. A fourth and last reason is, because there is no certainty either of the beginning or ending thereof, and therefore it cannot be a good lease. But a better reason than any of these seems to be, that he having in the first part of the deed made a lease in express and proper words, must be supposed to mean something less in this last part of the deed, which varies so widely in the form of expression, and which has a natural and proper meaning of its own as a covenant, but cannot amount or come up to a lease, without violence and force done to the words, as well as the intent of the parties. And this the rather seems probable, because *Moor* holds clearly, that if it had been provided that if the lessor die within sixty years, that then he demised the land to another (who was also a party to the deed) for so many of the sixty years as should be then to come; this would be a good lease; for here he comes into the very same form of expression made use of in the first part of the deed, which was an actual demise, and therefore must be supposed to mean the same thing in the latter part too, and consequently, such words would make it an actual demise.

Cr. Jac.
172. Roll.
Abr. 847.
2 Mod. 80.

A. seized of lands in fee, by indenture, covenants with *B.* before *Easter* then next, to convey those lands by fine, or other assurance to *B.* and his heirs, to the use of him and his heirs, with a proviso, that if *A.* paid to *B.* 100 *l.* at the end of thirteen years, that then he might re-enter, and all assurances should be to the conusor; and he covenanted and granted for him and his heirs, that *B.* and his heirs should enjoy those lands till the end of the said thirteen years, and for ever after, if the 100 *l.* were not paid; and *B.* covenanted to pay annually, during the thirteen years, two capons, and that during the thirteen years he would

not

not commit waste ; no assurance was made within the time : and if this, upon the whole deed, amounted to a lease for thirteen years, was the question ? And it was adjudged that it was no lease, but only a bare covenant, and this judgment affirmed in error : for the intent of the parties was to make assurance of the inheritance by way of mortgage, and the covenant was only that he should enjoy the lands during the time of the mortgage, whether it continued thirteen years only, or for ever ; and if a fine had been levied, or a feoffment made, it is plain this deed had been no lease, but only a covenant to lead or declare the uses of such fine or feoffment ; and though none was levied or made, yet the deed still continues of the same nature as it did at first, or as if such fine or feoffment had been actually executed ; and the covenant on *B.*'s part, that he would do no waste, does not expound it otherwise, for that was only that he, being a mortgagee in fee, should do no waste, for which otherwise there would be no remedy.

So, where one, by indenture enrolled, for money, bargained and sold lands to one and his heirs, provided, that if the bargainor for five years paid annually 10*l.* to the bargainee at the days limited in the deed, and at the end of the said five years shall pay 240*l.* then the bargain and sale to be void : provided also, and it is further covenanted and agreed between the said parties, that the bargainee, his heirs or assigns, shall not intermeddle with the actual possession of the premises, or the perception of the rents and profits, till default be made in the payment of the said sums : this was held to be no lease to the bargainor for five years, but only in the nature of a lease at will, by reason of the negative words, that the bargainee should not intermeddle with the rents and profits for that time, and, consequently, so long was to leave the bargainor in possession as he was before.

So, where *A.* acknowledged a recognizance to *B.* of 200*l.* and *B.* by indenture of defeasance, did covenant, promise, and agree with the said *A.* that if *A.* his heirs or assigns, should, after such a time, convey such an advowson to him and his heirs ; and if the said *B.* his heirs, executors, &c. should and might at all times thereafter, peaceably and quietly have, hold, use, occupy, possess, and enjoy the said advowson, without the let, suit, trouble, &c. of the said *A.* or any other person or persons, &c. then the recognizance to be void ; and the question was, if this last clause amounted to a lease of the advowson ? The court was of opinion that it did not, for the intent of the parties was not to make a lease of it, but only a condition to defeat the recognizance ; and this last clause should have relation to the estate in fee precedent, being, if the said *A.* his heirs, &c. which cannot be intended of a lease : and further, the clause is indefinite, at all times hereafter, and does not limit any certain time, for life or years, wherein the advowson shall be peaceably enjoyed, and therefore shall be intended during the estate in fee before mentioned : but no judgment was then given.

Cro. Jac.
659.
Palm. 201.
2 Roll.
Rep. 241.
Roll. Abr.
859. Pause-
ley and
Blackman.

Co. Ent.
85. a.
Bradston
v. Buck.

Dyer, 124.
pl. 40. 125.
pl. 44.
Plowd. 148.
150.
Bro. tit.
Leases, 71.
Yelv. 85.
Brownl.
136.

If one makes a lease for life, and after grants that the lands or the reversion shall remain to another for twenty-one years after the death of the tenant for life, these words are sufficient to pass a reversionary interest by way of future lease without attornment, though there is not the word *demise*, or any other word usual or proper to describe a lease for years by ; for here, being words sufficient to prove a present contract for the reversionary interest of these lands, after the estate for life determined, these, in case of a lease for years, which is but a contract, are in themselves sufficient, and adequate to any other form.

(L) What Certainty is requisite to Leases for Years as to their Beginning, Continuance, and Ending ; And herein,

1. With regard to the Date of the Lease.

Mod. 180.

AS to the date, they may be considered either as it is an impossible date, or an uncertain date ; between which the general difference taken in the books, is, that if a lease be made to begin from an impossible date, there, the lease shall take effect from the delivery ; because it could not be any part of the agreement between the parties, as from the 30th day of *February*, or the 32d day of *April* next : but where the limitation is uncertain, as a lease in *October*, *habendum* from the 20th of *November*, without saying from *November* next following or preceding, or what other *November* ; this uncertainty vitiates the lease itself, because it was part of the agreement, that the lease should begin from the 20th day of some *November* or other ; but it not appearing to the court what *November* was intended, they cannot determine it for the parties, and therefore for such uncertainty the lease itself becomes void.

Sid. 461.
Vent. 84.
2 Keb. 656.
[In two of the cases put, the period of time at which it is the intent of the parties that the lease should begin is manifest, and therefore the leases ought to commence from

So, where a lease is made to begin from the nativity of our Lord God last past, without saying from the feast of the nativity, this lease shall begin presently ; because it could be no part of the agreement between the parties that the lease should begin from the nativity itself, which is past so many hundred years ago ; and therefore, for this impossibility of relation, the lease shall begin presently. But if it were to begin from the nativity of our Lord God generally, or from the nativity of our Lord God next ensuing omitting the word *feast*, *Twifden* was of opinion such lease should be void, for the uncertainty of its commencement. But *Sid.* in reporting the case, seems to be of a contrary opinion, and makes a *quere*, if it shall not begin presently ? and, in truth, this seems the most reasonable opinion, for as to impossibility of relation, there is the same in this as there is in the other ; and therefore, by the same reason, it shall begin presently.

To suppose that they referred to an event which happened about two thousand years ago, or had in view an event which never will happen, is to suppose them not in a capacity to contract.]

In ejectment, if plaintiff declares on a lease by *J. S.*, 20 *August* for twenty years *a festo annunciationis beate Mariæ Virginis ultimo præterito ante datum hujus indenturæ* or *indenturæ prædictæ*, where no mention is made of any date or indenture before in the declaration, this lease shall be taken to commence from the feast of the annunciation next before the 20th of *August* in that year wherein the declaration is; because it must have been so constructed if the word *ante datam hujus indenturæ* had been omitted, and the addition of those words can be to no purpose, nor of any use, when no indenture at all is mentioned before, and therefore shall be void, or as if they had been totally omitted.

Roll. Abr.
849. Dar-
cett's Case,
850. Elme
v. Leaves.

If a lease be made for thirty-one years, *anno 1531*, and after, *anno 1535*, the lessor, reciting the said lease, by indenture makes a new lease in these words, *noveritis me dictis 31 annis finitis & completis dedisse & concessisse omnia præmissa to J. S. habend. & tenend. a die consecutionis præsentium (termino prædict. finito) usque ad finem termini 31 annorum tunc immediate sequentium plenarie complendorum*; this lease shall begin in computation from the expiration of the first lease for thirty-one years after such expiration of the first lease; for if it should begin from the day of the making of the deed, then there would be four years thereof to come after the expiration of the first lease, which would be plainly against the intent of the parties; and therefore it shall be interpreted that the lessee shall have it for thirty-one years after the day of the date, and the expiration of the first term of thirty-one years, *viz.* after both.

Roll. Abr.
849.
Dyer, 261.
Leon. 199.

So, where lessee for an hundred years made a lease for forty years to *B.*, if he should so long live, and after leased the same lands to *C.*, *habend.* for twenty-one years from the end of the term of *B.*, to begin and be accounted from the date of these presents; and the question was, if the lease to *C.* should be said to begin presently, or after the term of *B.*? The judges were clear of opinion, that the lease to *C.* should not be accounted from the time of the date, but from the end of the term of *B.*, because by the first words it is a good lease in reversion in that manner; and then it shall not be made void by any subsequent words; or, as *Coke* said, the last words ought to be construed to give an interest as a future interest presently, and the actual possession after the expiration of the first forty years term is well granted by the first words.

Godb. 166.
Dyer, 261.
b. in margin.

A man made a lease for years, to begin at the feast of our *Lady Mary* for twenty-one years, without shewing in certainty at which of the feast of our *Lady*, *viz.* the *Annunciation* or the *Purification*; yet *Anderson* held it a good lease, and that the lessee might determine the certainty of the beginning of the lease, by his entry, at which of the feasts he thought fit; but *Periam* doubted; and in truth this case seems within the rule before laid down to be void, for the uncertainty of the time of its commencement.

Leon. 227.
Pl. 308.

In ejectment the plaintiff declares upon a lease for years, *habend.* from the sealing and delivery, and declares that the sealing and delivery was 1^o *Maii*, and the ejectment was the same day: it was moved in arrest of judgment, that the ejectment could not be supposed

4 Leon. 144.
Highman
v. Cook.

posed the same day, for the lease did not begin till the next day ensuing the sealing and delivery. But the court disallowed the exception; for where the lease is to begin from the time of the sealing and delivery, or generally to hold for twenty-one years next following, the ejectionment may well be supposed to be the same day; for the beginning of the lease is presently upon the sealing and delivery; and therefore such a lease shall end the same time and hour.

Roll. Abr.
850.

Hob. 18.

Moore v.

Hussey.

[That a lease may commence at one day in point of computation, and at another in point of interest is manifest

from the case of Enys v. Donnithorne, 2 Burr. 1192. where it is holden, that a lease, to hold from a day past for fifty years thence next ensuing, the said term to commence and begin from and immediately after the surrender, forfeiture, or other determination of an existing lease of the same premises, was not uncertain in its commencement.]

4 Leon. 14.

pl. 52.

Frice v.

Foster.

In ejectionment the plaintiff declared upon a lease made 14 Jan. 30 Eliz. from Christmas before for three years, and upon evidence the plaintiff shewed a lease bearing date 13th Jan. the same year, and proved to have been then executed; and it was moved, for this variance between the declaration and the evidence, that the jury might be discharged: but Anderson Ch. Just. said, that the evidence was sufficient to support the declaration; for if the lease was sealed and delivered 13 Jan. it was then a lease 14 Jan. *quod. ceteri iusticiarii concesserunt.*

Roll. Abr.

850.

Cornish v.

Cawley.

If an indenture of demise bears teste 25th March, 15 Car. and is delivered the day of the date, and the *habend.* is from and after the day of the date of these presents, for and during the time and term of seven years from henceforth next and immediately following fully to be complete and ended; this lease begins in computation from the delivery of the deed, which was the day of the date, and in interest the next day after the date, and so all the words will have an operation; for it appears that the lessor was not to have the possession till the next day after the date, by the words *habend.* from and after the day of the date, which excludes the day of the date, but that the seven years should commence by computation from the delivery, viz. from henceforth, which refers to the limitation of the seven years; and therefore where the plaintiff declared on this lease by indenture dated 25th of March *habend. a die datus* for seven years, it was adjudged against him; for by computation it began *a datu indenturæ.*

Plow. 198.

Dyer, 177.

pl. 35.

If one makes a lease to A. for twenty-one years, and after makes another lease to B. for years, to begin *a fine & expiratione prædictæ.*

prædict. termini 21 annor. dimissor. to *A.*, and then the lease to *A.* is determined, either by an express surrender, or by an implied surrender in law, as by *A.*'s acceptance of a new lease for life from the lessor, the lease to *B.* shall begin presently: but if the lease to *B.* had been to begin *post finem & expirationem prædict. 21 annor.*, there the lease to *B.* should not begin upon the surrender, forfeiture, or other determination of the first term to *A.*, till the twenty-one years actually run out by effluxion of time: the reason of which difference is, that in the first case the word *term* comprehends as well the estate or interest in the land as the time for which it is demised; and therefore the second lease being limited to begin *a fine & expiratione prædict. termini 21 annor.*, whenever the term which includes also the estate and interest is determined, the lease to *B.* shall begin; but in the other case the lease to *B.* is not to begin till after the end and expiration of the twenty-one years, which cannot be ended but by effluxion of time.

The bishop of *Bath and Wells*, 18 H. 8. made a lease in writing to *A.* and *B.* for sixty years; proviso, that if the said *A.* and *B.* die within the said term of sixty years, that then, after the death of the said *A.* and *B.*, and of the longer liver of them, it shall be lawful for the said bishop and his successors, to enter into the said lands: *A.* dies; the bishop dies: and his successor, 22 H. 8. demises the said lands to *C.*, *habend. cum post five per mortem, sursum redditionem, vel forisfact. præd. B. vacare contigerit*, for sixty years, with confirmation of the dean and chapter; and then *B.* dies within the sixty years, and the grantee of the bishop would avoid this lease to *C.* 1. Because being limited to begin upon one of three events, *viz.* death, surrender, or forfeiture, none of which happened, it could not begin at all; for it was not determined by the death of *A.* and *B.*, within the sixty years, as all the court agreed, but continued till the lessor or his successors entered; for so it was expressly provided by the lease, and that was a mere condition, and not a limitation; and then the second lease, as was argued, cannot begin at all, or at least the time thereof shall run on from the death of *B.* the survivor. But it was adjudged the second lease was good; for it was not only limited *cum per mortem, sursum redditionem, &c.* the first lease should determine, but also *cum post mortem vacare contigerit*; so that this second lease may well begin when the first term by effluxion of time is run out *post mortem* of the parties. And this differs from a remainder limited to one after the death of another: there, it ought to begin immediately after the death, without any *interim*; but here, it shall not begin till after the first term run out *post mortem*, whenever in such manner *vacare contigerit*, and is a good lease presently in point of interest, to take effect in possession whenever the first lease, by any of these accidents, happens to be at an end, and is a good *interesse termini* in the mean time. And this construction ought to be made, to support the lease, because it shall be taken most strongly against the lessor, and for the benefit of the lessee.

If *A.*, reciting that *B.* hath a lease for years of such lands, demises the same lands to *C.* for years, to begin after the end or determination

Co. Lit.
45. b.
Co. 154.
Roll. Abr.
849.
Leon. 106.

6 Co. 34.
Cro. Jac.
71. Bishop
of Bath and
Wells's case,
Dyer, 312.
pl. 29.

Bentl. pl.
72.
And. 3.

Dyer, 116.
 pl. 70.
 Bro. tit.
 Leases, 62.
 Plow. 148.
 Roll. Abr.
 849. Cro.
 Car. 399.
 Jon. 355.
 Miller and
 Manwaring.
 Co. Lit.
 46. b.
 Lev. 77.
 Keb. 360.
 Basset v.
 Lewis.
 2 Leon. 11.
 pl. 17.
 Vaugh. 73.
 2 Lev. 242.

determination of the said lease to *B.*, where in truth *B.* hath not any lease at all of those lands, the lease to *C.* shall begin presently; for in judgment of law, a void limitation and no limitation is all one. So, if he recites a lease which in construction of law appears after to be void, or misrecites a good lease in a point material, *habend.* from the end of the said lease, this new lease shall begin presently; though where the first lease is good in law, and only misrecited in a point material, the new lease can begin presently only in enumeration of years, not in interest, till the end of the first lease; for in these cases the commencement of this new lease, being referred to a thing which is not, cannot be any ways ascertained or governed thereby, and then it is as if no such recital had been, which would have left the lease to begin presently, as the strongest construction against the lessor, since there is nothing now to ascertain or determine its beginning at any other time.
 [See Preston on Estates, ch. "Estates for Years."]

Lev. 234.
 Sid. 460.
 Vent. 83.
 2 Keb. 322.
 Foot v.
 Berkeley.

So, where the queen-mother, having the inheritance of certain lands settled on her for her jointure, 14 *Car.* 1. reciting, that whereas Queen *Eliz.* 22 *April* in the 42d year of her reign, had demised those lands to such a one, &c., (whereas the lease intended was in truth 32 *Eliz.*) the said queen-mother did thereby demise the said lands, to begin after the end or determination of the estate granted to the other *per literas patentes prædictas*, for twenty-one years; and the question upon this misrecital was, when the second lease for twenty-one years should begin? whether after the expiration of the first lease made 32 *Eliz.* though falsely recited to be made 42 *Eliz.*? or whether it should begin presently? It was adjudged, that for this misrecital the second lease should commence presently; and so the lessee was obliged to pay a rent of 60*l.* *per annum* for the whole twenty-one years, though he had nothing in the lands all that time. And this judgment given in *C. B.* was afterwards affirmed upon error in *B. R.* And in this case the court agreed, that if the date of the recited lease only had been mistaken, and the second lease had been of the lands, *habend.* after the expiration or determination of the estate or lease of the first lessee generally, in such case the second lease had been good, and should not have begun before; for then there had been sufficient certainty for the time of its commencement, and then *utile per inutile non vitiatur*; but here being limited to begin after the determination of the estate granted *per literas patentes prædictas*, where there were no such letters patent, and so the relation idle and null, the second lease begins presently, as if no such recital or relation had been, and there is no *utile* at all; for it is tied up to begin after a lease which is not. And as to *Periam's* opinion, that if I let lands to *B.* to begin after the expiration of a lease thereof, which I have made to *J. S.*, where in truth I have made no lease to *J. S.*, that the lease to *B.* shall never begin; this was denied to be law, and against the current of all authorities. The court further said, the principal case here differs from *Withers* and *Casson's* case, where

Hob. 128.
 Withers v.
 Casson.

one

one made a lease for years, *habend. a festo purificationis*, and after by deed, reciting that he had made a lease to commence *a festo annunciationis*, granted the reversion to another, and that grant held good: for in the grant in the reversion the misrecital of the particular estate is not material in the case of a common person, so long as he hath a reversion in him; but here in the principal case one term is recited to give certainty to the commencement of another, and is tied up by such precise words to begin after the determination of the lease granted by the said recited letters patent, that this cannot be referred to a lease that varies in the date, though agreeing in other circumstances (which yet is not here, for the certainty of the term to *B.* is not recited): and though a lease is good without a date, yet when a lease is recited to be of such a date, a lease which bears another date cannot be said to be such recited lease; so that the lease here must begin presently; which, by the way, makes the grant good, either to pass the reversion with attornment, or being by indenture, to take effect upon the surrender, forfeiture, or other determination of the first term; and such recital makes no estoppel either against the lessor or lessee, or any claiming under them; or if it should, yet the jury are not estopped to find the truth; and then the court shall judge accordingly.

Vaugh. 82.
Vent. 84.

And this rule, that if the former lease be misrecited in the date, &c. and a new lease made, to begin after the expiration of the said recited lease, that such new lease shall begin presently, holds as well in the lease itself as where the jury find an indenture of lease, whereby it is recited, that the lessor made such former lease of such date, and under such rent, without finding it so in fact, but only by way of recital in the deed: such second lease shall in construction of law be adjudged to begin presently, though in the deed it is limited to begin after the expiration of the first lease so recited; because the jury do not actually find the first lease, but only a recital of it in another deed, which recital may be false, for ought appears to the court; and then the second lease shall begin presently, as if no such first lease were at all, since the not finding it effectually is, as if there were none such made.

Vaugh. 73.
80. Row
and Hunt-
ington.
Dyer, 93.
pl. 28.
4 Co. 74.
Palmer's
case.
Cro. Eliz.
603.

King *Hen. 8.* in the 31st year of his reign, leased lands to one for twenty-one years, and after granted the reversion to a bishop, who, reciting all the lands contained in the letters patent, and the land itself before leased, by name, and reciting the letters patent thus, that whereas *H. 8.* by his letters patent, dated 20 *H. 8.*, where in truth they were dated 31 *H. 8.*, and also misreciting the day of the date, grants all the lands, tenements, &c. to the first lessee for a certain number of years, *post expirationem hujusmodi literarum patentium*: in this case it seems, that the date being mistaken, and the commencement of the new lease referred to the expiration of the said letters patent, when in truth there were no such letters patent as were recited, the second lease shall begin presently, and so by acceptance thereof will amount to a surren-

2 Roll.
Abr. 55.
Halfwell and
Ayleworth.

der of the first: it would have been different, if the second lease had been limited to begin after the end of the first term generally.

2. With regard to other Circumstances taken Notice of in the Deed of Lease, whereby to ascertain the Commencement thereof.

As to other collateral circumstances taken notice of in the deed of lease in order to ascertain the commencement thereof, these are various, according to the agreement of the parties.

2 Leon. 86.
Godb. 25.
Co. Lit.
45. b.
Co. 155.
6 Co. 35.
Plow. 6.
373. 524.
Roll. Abr.
248.

Therefore, if one makes a lease for years to another for so many years as *J. S.* shall name, this at the beginning is uncertain; but when *J. S.* hath named the years, this ascertains the commencement and continuance of the lease accordingly, and in the mean time, if the lessee enters, he seems to be tenant at will. (But *quare* if by such entry before the commencement of the lease he is not a disseisor, as other lessees are who enter before their time?) But if the lease had been made for so many years as the executor of the lessor should name, this could not be made good by any nomination, because to every lease there ought to be a lessor and lessee; and here the nomination which ascertains the commencement not being appointed till after the death of the lessor, makes the lease defective in one of the main parts of it, *viz.* a lessor, and therefore, of consequence, must be void; which is also the reason that in the first case the nomination ought to be made in the lifetime of the lessor, and not by *J. S.* after his death, for then it will be void.

Co. Lit.
43. b.
Roll. Abr.
248.

If a person makes a lease for so many years as he shall live, or the parson of *D.* makes a lease of his glebe for so many years as he shall be parson there, these leases are said to be absolutely void, for the uncertainty of their continuance; because none can say how long the lessor will live, or be parson; and then it cannot be a lease for years, when by no possibility the number of years can be ascertained. But if the lease were for twenty-one years, or any other certain number of years, if the lessor should so long live, or continue parson, or if *J. S.* should so long live, these are good, because the lease at first is certain for the determinate number of twenty-one years, though the death of *J. S.* may determine it sooner; and that is a common and usual limitation, and seems to have been introduced to obviate the objection of uncertainty in the other manner of leasing. But even in that case it should seem that the lessee will be tenant at will, or if livery were made, will be tenant during the life or incumbency of the lessor, and so have the freehold in him, though for want of certainty in the number of years, he cannot be said lessee for years.

5 Co. 7.
Moor, pl.
340. Cro.
Eliz. 199.
2 Leon. 105.

One made a lease of *Blackacre* to *A.* for ten years, and of *Whiteacre* to *B.* for twenty years, and after by indenture reciting both leases makes a lease to *C.* of *Blackacre* and *Whiteacre* for forty years, *habend.* after the end or determination of the said several demises made to *A.* and *B.*, and then the lease to *A.* of *Blackacre* determines;

determines; and if the lease to *C.* therein should begin presently, or if *C.* must wait the determination of the other lease to *B.* likewise before his lease should commence, was the question? And, it was urged, that this lease should begin all at one time, and not have several commencements. But it was adjudged, that this lease to *C.* in *Blackacre* should begin presently; for the *habend.* shall be taken *respectivè reddendo singula singulis, viz.* that the first lease of *Blackacre* to *C.* for forty years shall begin presently after the determination of the first lease thereof made, and so for *Whiteacre*, when the first lease thereof determines: because every deed shall be taken strongest against the lessor or grantor, and most beneficially for the lessee or grantee, the reverse whereof would happen in this case without such construction, and it would be against the plain intent of the parties, to let in the lessor to the possession and enjoyment of the lands comprised in the first lease, till the second lease, which had no relation thereto, were determined.

In ejectment the plaintiff declared, that *J. S.* demised to him *per quodd. scriptum obligatorium* such lands, *habend. a die datùs indenturæ prædictæ*; on not guilty pleaded, it was found and adjudged for the plaintiff in *Ireland*: and it being assigned for error here, that there was no time specified when this lease should begin; for it was *habend. a die datùs indenturæ prædictæ*, and no indenture was mentioned before, but only *scriptum obligatorium*; it was resolved, that the writing should be intended an indenture, though improperly called *scriptum obligatorium*; for every deed obligeth; or if it should not be intended an indenture, then it begins presently, as if it had been from an impossible limitation, as the 40th of *Sept.* or such like.

Copyhold land was granted to *A., B.,* and *C.* for their lives *successivè*; and then the lord grants and demises the said land to *D.* for forty years, after the death, surrender, forfeiture, or other determination of the estate to *A., B.,* and *C.*; then *A.* and *B.* die, *C.* marries, and dies; and his wife holds herself in for life by the custom, as her free-bench, and dies; and if the lease for forty years should commence from the death of the husband or the wife, was the question? for if it should begin from the death of the husband, it would be now ended, and so the ejectment not maintainable; if from the death of the wife, there would be yet twenty years of the lease to come: And *per curiam*, though the law will in general supply these words, *which should first happen*, so that the lease should begin upon the death, forfeiture, surrender, or other determination, which should first happen, yet in this case it shall not begin till after the death of the wife, for that is the first effectual determination thereof: for it does not determine to any purpose by any of the other ways, since the wife is in, in continuance of her husband's estate, for life; and it cannot reasonably be intended that this lease should begin during the continuance of the precedent estate, which by possibility may continue longer than the forty years; for the wife may outlive the forty

Vent. 137.
2 Keb. 796.
Taylor v.
Fitzgerald.

Lev. 20.
Chantrell
v. Randal.
2 Sid. 165.
S. C. by the
name of
Clerk v.
Candle.
[Adjourn.
according
to both re-
porters]

forty years, and then the lease for forty years from the death of the husband would be void.

Mich.
6 Geo. 2.
in Canc.
Irish v.
Hook.

So, in a late case, where *B.* had a lease of twenty-one years of copyhold lands, to commence after the determination of the estate which *A.* at that time had therein, and the widow of *A.* being entitled to her free-bench, and happening to outlive her husband twenty-one years, it was held by my Lord Chancellor, that the estate of the wife was only an excrescence of her husband's estate, which did not determine till the wife's death, at which time the lease made to *B.* should commence, and continue for twenty-one years.

3. The Certainty of Leases for Years as to their Continuance.

Plow. 271.
Say v.
Smith and
Fuller.

As to the certainty of leases for years, as to their continuance, this ought to be ascertained either by the express limitation of the parties at the time of the lease made, or by a reference to some collateral act, which may with equal certainty measure the continuance thereof, otherwise they will be void.

Plow. 271.

Therefore, where a man made a lease for ten years, and granted that if the lessee, his heirs or assigns, should pay to the lessor or his assigns, such a parcel of tiles at the end of every ten years next ensuing, that then he, his heirs or assigns, should have a perpetual demise of the premises from ten years to ten years continually following, and out of the memory of man; this was held to be a good lease but for ten years certain; because for all the years to come it was uncertain (besides the repugnancy and non-sense of the words *extra hominum memoriam*); for the payment of the tiles was to precede all the ten years that ever should be, and so must last to the end of the world, before any second ten years, by virtue of the lease, was to begin; and then to be sure there could be no ten years at all; and so all the other ten years, being to begin upon an impossible condition precedent, can never take place at all, but are absolutely void and idle.

Co. Lit.
45. b.
6 Co. 35.
Plow. 273.
Roll. Abr.
849.
3 Co. 19.
Plow. 522.

If *A.* lets lands to *B.* for so many years as *B.* hath in the manor of *D.*, and *B.* hath then a term for ten years in that manor, this makes *A.*'s lease to him good, and fixes the measure and continuance thereof, so that *B.* shall have the lands demised for ten years. So, a lease to one during the minority of *J. S.*, who is then ten years of age, is a good lease for eleven years, if *J. S.* so long live; for if he die sooner, that determines the lease, since nothing appears to extend it beyond his life, and his minority ceases by his death.

6 Co. 35. b.
Plow. 273.
Co. Lit.
42. a.

If I have a rent of 20*s.* *per annum* in fee issuing out of *Black-acre*, payable annually at the feast of *Easter*, and I grant that rent to another till he shall have received of the same rent 21*l.*, the grantee shall have the rent for twenty-one years certain, because the land is a certain security for 20*s.* *per annum*, which will take up twenty-one years certain to answer 21*l.*, and therefore so long the grant of the rent shall have continuance.

But

But if a man lets lands of the value of 20 s. *per annum* till 21 l. be levied of the issues and profits, this is but a lease at will without livery, because it is uncertain whether the land will be every year of an equal value; and though livery should be made, whereby he will have a lease for life, or a freehold estate, yet this will be determinable upon the 21 l. levied; for by the original contract he was to have it no longer than till the money levied.

6 Co. 35.
3 Leon. 157.
Bro. tit.
Leases, 67.
Co. Lit.
42. a.
3 Bulf. 100.
Plow. 273.

If a woman be *ensent* with a son, and a lease be made till such issue *in ventre sa mere* shall come to full age, this is a lease only at will, and cannot be any lease for years; because it is uncertain when or whether ever the son will be born, and consequently the beginning, continuance, and ending of this lease is uncertain; and therefore it cannot be said any lease for years, since it is to begin presently as a lease: and yet nothing appears in the deed itself, nor is there such a reference to any collateral circumstance as may then measure the continuance thereof.

6 Co. 35.

If *A.* seised of lands grants to *B.* that when *B.* pays to *A.* 20 s. that thenceforth he shall have and occupy the lands for twenty-one years, and after *B.* pays the 20 s.; this is become a good lease for twenty-one years from the time of such payment made; for though the commencement of it was contingent and uncertain, and depended upon *B.*'s election to pay the 20 s., yet after he had paid them, this takes off all uncertainty, and fixes the commencement and continuance of the lease.

Co. Lit.
45. b.
6 Co. 35. a.
Roll. Abr.
849.

If one makes a lease to *J. S.* for twenty years, if the coverture between *A.* and *B.* shall so long continue, this is a good lease for that time *primâ facie*, though the dissolution of the coverture may determine it sooner. And there also it seems, that a lease to one generally during the coverture between *A.* and *B.* is a good lease: but this surely can be no other than a lease at will, for the uncertainty how long the coverture will continue takes off from any certainty in the number of years that can be affixed to such lease; and consequently, it cannot be esteemed any lease for years, more than where it is for so many years as the lessor shall live, or continue parson, &c.

Plow. 273.

If one lets lands for one hundred thousand days, this by *Bro.* is a good lease for that time, because the measure and continuance thereof by days is as certain as it would be if it were for so many years as comprehend those days, since days are part of and go to make up the years; though it should seem that this cannot be properly called a lease for years, because the years are only an accidental circumstance in the enumeration of the days, not any part of the original contract between the parties.

14 H. 8. 13.
Bro. tit.
Leases, 13.

If a man makes a lease for years, without saying how many, this shall be a good lease for two years certain, because for more there is no certainty, and for less there can be no sense in the words.

6 Co. 35-6.
Bro. tit.
Leases, 13.

If one makes a lease for ten years at the will of the lessor, this is a good lease for ten years certain, and the last words void for the repugnancy by *Bro.* But if one lets lands at will for a year, *Et sic de anno in annum*, this is a lease only at will by

Bro. tit.
Leases, 13.
22. 14 H. 8.
13. a.

the first words, and the last words being repugnant shall not controul them, or add any more certainty to its continuance.

2 Roll.
Abr. 851.
6 Co. 35. b.

If a man leases lands for such a term as both parties shall please, this is but a lease at will, because what that term will be is utterly uncertain; and the pleasure of the parties seems to be limited to attend the continuance as well as the commencement and first fixation thereof.

3 Bulf. 158.
Roll. Rep.
187. 2 Roll.
Abr. 850.
Dyer, 24.

A parson made a lease of his rectory to one for three years, and so from three years to three years, and so from three years to three years during his life; or, as it is in *Rolle*, for three years, and at the end of those three years for other three years, & sic de *tribus annis in tres annos* during the life of the lessor. The whole court held it clearly a lease for twelve years; but by *Dodderidge*, if the lease had been for three years, and so from three years to three years, and so from the said three years to three years; this had been but a lease for nine years, because the words *from the said three years* tie up the relation retrospectively to the three years last mentioned, which made in all but six years, and then there are but three years more added, which make the whole but nine years; and for the words (*during the life of the lessor*,) they cannot enlarge it to any further certain number of three years, by reason of the uncertainty of the lessor's life; and therefore, beyond the twelve years, or nine years, it amounts only to a lease at will, unless livery were made, which must necessarily pass a freehold determinable upon the lessor's death.

3 Keb. 760.
768. Fer-
ringham v.
Graves,

And yet in one book where a lease was made for three years, and after the end of those three years for other three years, & sic de *tribus annis in tres annos* during the life of the lessor; this was held to be only a lease for nine years, because the words & sic de *tribus annis* shall be referred to the three years last mentioned; for otherwise these words would exclude the three years next after the six years, and make the three last years to begin after nine years, and so make a chafin in the lease, by shutting out the three years next after the six years, so as for the three last years it should be only a future interest; which case seems to be of a new stamp, and to thwart the preceding case, as to the resolution of its being a lease for twelve years; and there *Jones* and *Wild* held, that a lease *a tribus annis in tres annos* was but a lease for three years to commence in futuro.

2 Lev. 241.
College of
Manchester
v. Trafford.
[2 Show.
31. S. C.
reports it a
lease for 21
years to the
same person,
and after in
the same
lease a cove-
nant that
the lessee
shall have
the lands for

Error of a judgment at *Lancaster*, where the case on a special verdict was this: The college in the time of *Queen Eliz.* reciting a lease made by them 1 *E. 6.* demised to one *Traf- ford* for twenty-one years rendering 20*l.* per ann. rent, *habendum* from the end of the said term, made in the time of *E. 6.*, and then follows a condition of re-entry for non-payment of the rent, and after that a covenant and grant, that after the said twenty-one years ended the lessee shall have the land for other twenty-one years, and so from twenty-one years to twenty-one years, till ninety-nine years are past thence next ensuing shall be complete and ended; and it was found that there was no lease made in the time of *E. 6.*, and that since the date of the lease made in the

time

time of Queen *Eliz.* more than ninety-nine years are passed, but from the end of the term of twenty-one years ninety-nine years are not yet come; so that the question was only, if the lessee shall have ninety-nine years in all from the time of the date of the lease *tempore Eliz.* or ninety-nine years over and above the first twenty-one years? for it was agreed, that though no number of twenty-one years will center in ninety-nine, yet the term shall last for ninety-nine years, which is a certain term, and the odd years shall be rejected. And it was adjudged at *Lancaster*, that the lessee shall have ninety-nine years besides the first twenty-one years, which shall not be accounted parcel of them, and that by reason of the word *thence*; for if it should be from the making of the lease *tempore Eliz.* it would be *hence*; but *thence* is a word which denotes another time, not the present time, and so *thence* must refer to the making of the first twenty-one years, because there is no other time to which it can refer, there being no lease at all *1 E. 6.* to which it can refer, and so the term is not yet expired; and of that opinion was the whole court, and the judgment was affirmed.

If a man makes a lease for a year, and so from year to year, *quamdiu ambabus partibus placuerit*, this is a lease for two years certain at least; and at most, after three years, this is but an estate at will: so, if a parson makes a lease for a year, and so from year to year as long as he shall continue parson, or as long as he shall live; this is a lease for two years at least, if he lives and continues parson so long; and after the two years, or at most after three years, but an estate at will for the uncertainty, unless livery be made.

One made a lease for three years, and after for three years, and so from three years to three years until ten years be expired: this was resolved to be a lease but for nine years; and that the odd year should be rejected, because that cannot come to fall within any three entire years according to the limitation, which in this case is to be taken all together as one year, else so much of the limitation, as cannot come within that description, must be rejected. And this seems to agree with *Brook* and *Plowden*, who in general hold a limitation in that manner from year to year for forty, fifty, or one hundred years to be a good lease for the whole term, because this is no such break of an odd year, at the latter end of the lease, as there is in the other case.

One made a lease *de anno in annum, quamdiu ambabus partibus placuerit*: this was agreed by all to be a lease certain for two years: but there the lessee entered and occupied for two years, and also for part of the third year, and then died; and for rent arrear for part of the third year debt was brought against his executors; and upon *nihil debet* pleaded, and verdict for the plaintiff, it was moved in arrest, &c. that after the two years, this being a lease at will determined by his death, and then no action lies for the rent of the third year; and of this opinion was *Popham*. But it was held by *Gawdy* and *Fenner*, that though at first this was a lease certain but for two years, yet when he occupied part of the third year, this was then become a lease certain for that year also,

21 years more after the expiration of the said term, and so from 21 years until 99 years be complete and ended; and adjudged good, and to be two leases, and not one, viz: for 21 years, and also for 99 years besides.]

Plow. 273.
Co. Lit. 45. b.
6 Co. 35.
Cro. Jac. 308.
Bulf. 215.
Roll. Abr. 851.
Lev. 46.
2 Jon. 5.
Lutw. 214.
Noy, 143.
Roll. Abr. 850.
Bro. tit. Leases, 49.
Plow. 273.
522. a.
2 Co 23.
2 Lev. 241.

Cro. Eliz. 775.
Agard v King. Mod. 3.
Sid. 423.
2 Keb. 543.
Gostwick v. Mason. Keilw. 63.

so that neither of them could avoid it; for otherwise, after that the lessee hath been at great charges in manurance, the lessor, by a determination of his will, might strip him of all his profit.

Hill. 7 Ann.
in B. R.
Legg v.
Hackett.
2 Salk. 414.
pl. 6. S. C.
by the name
of Legg v.
Strudwick.

A parol lease was made *de anno in annum, quamdiu ambabus partibus placuerit*; it was adjudged that this was but a lease for a year certain, and that every year after it was a springing interest, arising upon the first contract and parcel of it; so that if the lessee had occupied eight or ten years, or more, these years, by computation from the time past, made an entire lease for so many years; and if rent was in arrear for part of one of those years, and part of another, the lessor might distrain and avow as for so much rent arrear upon one entire lease, and need not avow as for several rents due upon several leases, accounting each year a new lease. It was also adjudged, that after the commencement of each new year, this was become an entire lease certain for the years past, and also for the year so entered upon; so that neither party could determine their wills till that year was run out, according to the opinion of the two judges in the last case. And this seems no way impeached by the statute of frauds and perjuries, which enacts, that no parol lease for above three years shall be accounted to have any other force or effect than of a lease only at will: for at first, this being a lease certain only for one year, and each accruing year after being a springing interest for that year, it is not a lease for any three years to come, though by a computation backwards, when five or six or more years are past, this may be said a parol lease for so many years; but with this the statute has nothing to do, but only looks forward to parol leases for above three years to come. And this opinion, in the principal case, seems to be confirmed by a like resolution of the court, where the plaintiff declared, that he retained the defendant *anno 1657* for one year then next ensuing, and so from year to year, *quamdiu ambabus partibus placuerit*; and laid it, that *anno 1661*, the defendant withdrew himself from his service for a month, *per quod, &c.* And the court held, that though the retainer at first was for a year certain, yet after every other year begun, the retainer held for that year also, and gave judgment for the plaintiff.

2 Keb. 16.

2 Salk. 413.

[A lease
was granted
" to hold
" from Michaelmas-
" day for
" one whole
" year, and
" so for two
" or three
" years, or
" any such
" further
" term of

And yet there are other cases in which it seems to have been held, that a lease made *de anno in annum, quamdiu ambabus partibus placuerit*, is a lease for two years certain at first, and after a lease for every several year that the lessee holds on; and that if upon such lease three years rent be in arrear, the declaration must be of several leases for so many years as were past. And it is held, that to oust the lessee there must be half a year's warning given (*a*), ending at the expiration of the year; and that unless such warning be given, it will be evidence of an agreement to hold for another year (*b*). However, it appears from all the cases, that there is yet no uniform, unanimous opinion settled as to this matter.

" years as the parties should think fit and agree, on yielding and paying for the said one year, and from
" thence yearly and every year during such term or terms as should be thereafter granted, 35 l. per
" annum." According to Wilson's report, this was adjudged to be a lease for two years. Harris v.
Evans, 1 Will. 262. But according to Ambler, who was of counsel in the cause, it was holden to be a
lease for one year only without a subsequent agreement; for if it had been doubtful under the words of
the *indenture*, those under the reservation fully explained them. Ambler, 329. If we suppose the court
to be relating to different periods of time in these reports; in the former, to the time past, to the time
the

the tenant had actually occupied; in the latter, to his estate at the commencement of the lease; both reports may be correct, and there will be no contradiction between them. For it is now clear that a lease for a year, and so for such further term as the parties shall agree upon, or, from year to year, as long as both parties shall please, is, with a view to its present extent, a lease for a year certain, and no more; though with a view to the time which has elapsed, to the number of years the tenant has occupied, it is considered as an estate for all that time including the current year. In the case of *Agard v. King*, *supra*, where the court are made to say, that such a lease was a lease certain at first for two years, it is to be remembered, that they were not considering the present, but the past estate which the tenant had: what they say therefore must be taken to be with reference to that, and to import nothing more than that it was at first, that is, upon the expiration of the two years, a lease for those two years, whatever it might be as to the third year which the tenant had entered upon, and upon which only the question in that case arose. And so in the case of *Bellasis v. Burbridge*, referred to in *Salk. 413.* and fully reported in *Lutw. 213.* the lessee under a demise for a year, and so from year to year, &c. had occupied one year, and part of another; and the court say, that this was a good lease for two years at least; that is, that the tenant having continued the occupation part of another year, the lease was thereby become a good lease for that year; not that the lease by the terms of it was originally and in its creation a lease for two years certain.—And notwithstanding the puzzle and contrariety of opinion in the books with respect to these running leases, the law is now considered as settled agreeably to the case of *Legg v. Hackett* or *Strudwick*, above reported. They are leases for one, two, or more years, according to the form of the lease, dependent for their further continuance upon the will of the parties. If it be the will of the parties that they should have a further continuance (and that such is their will, the law will presume, unless the contrary be evidenced by a regular half year's notice to quit given by the one to the other), the tenant so continuing in possession is not a mere tenant at will, but a tenant for years: it is the will of the parties that he should continue the tenancy another year: his precarious interest is for such further term become certain; but he has still the same kind of estate which he formerly had. *Birch v. Wright*, 1 Term Rep. 380. *Prett. on Estates, ch. Estates for Years.* (a) 1 Term Rep. 162. (b) But this notice may vary according to the custom of the country, and the nature of the hereditaments in lease. *Roe v. Wilkinson*, Co. Lit. 278. b. note 1. 14th edit. 2 *Salk. 414.* 3 *Burr. 1609.*]

One let a stable for a week for 8s. and so from week to week at 8s. a week, *quandiu ambabus partibus placuerit*; this was held, at most, but a lease for three weeks certain, and for the residue at will; so that the lessee, at the end of the three weeks, was not punishable for negligent keeping of his fire, that being only an involuntary waste, wherewith lessee at will is not chargeable.

[A lease was granted for seven, fourteen, or twenty-one years, as the lessee should think proper. And by Lord Mansfield, this was at least a lease for seven years; then if the lessee continues, it is for fourteen years; if at the end of that time he still continues, it is for twenty-one years. And agreeably to this decision, it hath been lately determined (c), that a lease for three, six, or nine years, determinable in 1788, 1791, 1794, is a lease for nine years, determinable by either of the parties at the end of the first three or six years, on giving reasonable notice to quit.]

3 Lev. 359.
Panton v.
Isham.

Ferguson v.
Cornish,
2 Burr.
1032. more
accurately
in 2 Term
Rep. 463.
(c) Good-
right v.
Richardson,
2 Term
Rep. 462.

4. The Certainty of Leases for Years as to their Duration and Ending.

As to this, though the preceding point may seem to have taken in all that can come in properly here, since the continuance of leases for years must shew their determination likewise; yet there are some cases remaining which seem more proper to be inserted under this head.

Therefore, where a lease was made for forty years to two persons, if they lived so long, or to A. for forty years, if he and B. should so long live, or the lessor and lessee, or the lessor and J. S. should so long live; in all these cases the death of either of them determines the lease, because their lives are the collateral measure

2 Bendl. 2.
pl. 2.
13 Co. 66.
2 Brownl.
292.
5 Co. 9.
Cro. Jac. 78.

3 Bulf. 131.
Roll. Rep.
309, 310.
3 Leon. 10.
pl. 150.

and limitation of the continuance of the term, or rather the condition whereon the estate depends: and by the death of one of them, the condition is as much broken as if both were dead; since, with regard to the condition, both made but one person; and they cannot now both so long live, one being dead already; and the condition being entire, cannot be severed or divided, so as when part of it is broken and gone, the estate should still subsist and hang upon the other part thereof: and therefore, this differs from a lease to two persons for their lives, for this gives an estate to both for their lives, and both have an estate of freehold therein in their own right, and consequently, this cannot determine by the death of one of them, for then the other could not be said to have an estate for his life, as the lessor at first gave it. But *Rolle* seems to think, that where it is to two for forty years, if they so long live, that this does not determine by the death of one of them, because it is an interest in both, which shall survive; but the other books are against it, because their life is but a collateral condition and limitation of the estate, which is broken when one dies.

Vent. 74:
Bailes v.
Wenman,
& vide
1 Brownl. 30.
Mod. 137.

Upon articles of intermarriage between *A.* and *B.* it was agreed, that the defendant, father of *A.* should settle the lands in question upon *C.* for his life, and after his death upon *B.* for her jointure, with a proviso, that *C.* should make a lease thereof to the defendant for ninety-nine years, if he and *D.* his wife should so long live, which lease was made accordingly; then *D.* dies, and if by her death the lease was determined, was the question between the defendant and the plaintiff, lessee of *C.*? And the court, upon the first opening of the case, without argument, were all of opinion that it was, and gave judgment accordingly on the reasons of the foregoing case.

Moor, pl.
375.
3 Bulf. 131.
133. Roll.
Rep. 310.
2 Brownl.
292. Cro.
Eliz. 269.
Leon. 74.
244. Co.
Lit. 225. a.

One made a lease for forty years, if *A.* his wife, or any of their issue, should so long live; and it was adjudged that the lease was not determined by the death of one of them, but should continue till all were dead, by reason of the disjunctive *or*, which goeth to and governs the whole limitation. But if the words had been, if *A. and his wife and issue should so long live*, there, clearly, by the death of any of them within the forty years, the term had been at an end, by reason of the copulative *and*, which conjoins all together, and makes all their lives jointly the measure of the estate.

Cro. Eliz.
643. Noy,
70. Wren-
ford v.
Gyles.

A lease was made for twenty-one years, if the lessee so long lived and continued in the lessor's service; the lessor dies: *per curiam*, the lease is not determined, because it was the act of God that he could serve no longer.

Dyer, 67.
pl. 18.
Co. Lit. 239.

A lease is made to two for years, with a proviso, that if the lessees die within the term, the term shall cease; they make partition, or one aliens his part, and dies, yet the lessor cannot enter into his part, but the assignee, or executors of the lessee, (if no assignment) shall have that part during the life of the survivor, and there shall be no occupancy. For it is not like a lease made to two for term of their lives; there, if they make partition, and one dies, his part shall revert to the lessor presently. And if it had

had been to them for their lives *Et eorum diutius vivent.*, yet this would not have prevented the reverter upon such partition, *quia expressio eorum quæ tacite insunt nihil operatur*; and the partition breaks the joint-tenancy, and defeats the right of survivorship, and so lets in the reversion *immediate* to each one's single part. But in the principal case, the lease at first is general and absolute to both for so many years, which gives them a joint-tenancy in the term, and will carry it to the survivor and his executors; and then the proviso, which comes after, though it straiten it from going to the executors of the survivor, yet it does not give it to the lessor till both are dead within the term; and the partition or alienation breaks the joint-tenancy, and prevents the survivorship, and consequently, none but the alienee, or executors of the lessee, can have that part during the life of the other lessee.

3 Aff. pl. 3.
4 Co. 73.
3 Bulf. 131.
Roll. Rep.
310.

(M) In what Cases, and to what Respects an Entry by the Lessee is requisite to the Perfection of his Lease.

AS to this it is to be observed, that at common law no lease for years, whether it were with or without any reservation of rent, was looked upon to be complete till an actual entry by the lessee: for though the lessor had done all on his part to perfect the contract, so that he could not afterwards any way derogate from, or avoid it, ye till there was a transmutation of the possession by the actual entry of the lessee, it wanted the chief mark and indication of his consent thereto, without which it might be unreasonable to adjudge him in actual possession to all intents and purposes; since it might so happen that such lease was made in his absence, and when he knew nothing of it, and perhaps might be greater than he would be willing to take; or the estate might be so incumbered as to bring a load upon him rather than any advantage. For these reasons (amongst others) the law would not cast the immediate and actual possession upon him *volens volens*; and therefore it was, that till actual entry he could not maintain an action of trespass or ejectment, because those actions, complaining of an immediate violation of the possession, could not be proper for him who had no actual possession. But the lessor having done all that was requisite on his part to divest himself of the possession, and pass it over to the lessee, had thereby transferred such an interest to the lessee, as he might at any time reduce into possession by an actual entry, as well after the death of the lessor as before, and such an interest as he might before entry grant over to another, or if he died before entry, would go to his executors; or, if the grant were made to two jointly, to the survivor and his executors, any of whom might enter at their pleasure, and so reduce the contract into an actual execution; for it was perfect and complete on the lessor's part, and the perfecting of it on the lessee's part was entirely in his own power, and left to his own discretion

Co. Lit. 46.
b. 51. b.
270. a.
Plow. 142.
b. 423. a.
5 Co. 124. b.
Cro. Jac. 61.
2 Mod. 249.
2 Vent. 203.
204.

to use when, and as he thought fit. And therefore this differed from a lease for life, or a feoffment in fee; for these being estates of freehold must necessarily be executed by livery of seisin, which carried the immediate and actual possession to the lessee or feoffee, in as much as the operation of the livery could not be in suspense for the prejudice that might thereby accrue to strangers, who, after such solemn transmutation of the possession by livery, could take notice of no other tenant of the freehold, and therefore must necessarily bring their *præcipes* against him for recovery of their rights; which if they might after be defeated and eluded on pretence of any disagreement, or that there was no actual consent or agreement thereto, and so the actual possession not vested in him, would be greatly injurious to the rights of strangers. Besides that, the livery can be made to none but the lessee or feoffee himself in person, or some other person lawfully authorized by letter of attorney to receive the same; and therefore he can no ways be supposed ignorant of the terms upon which he took it, and so no such reason for suspending the actual execution of it. And therefore if a lease were made to *A.* for life, the remainder to *B.* for life, and then *A.* died, a release to *B.* and his heirs, before actual entry, would be good to enlarge his estate, because he had the freehold in law in him, immediately upon *A.*'s death, to answer to the *præcipes* of all strangers, as fully as he could ever have it by any entry. But now in the case of a lease for years it is quite different, as has been shewn; and therefore till actual entry, which is an agreement on his part, in case of such lease for years, equivalent to the acceptance of livery in case of the passing of a freehold, the lessee for years hath not the possession; and as he hath not the possession, so neither hath the lessor a reversion to grant either to the same lessee or a stranger. But yet if a rent were reserved on such lease for years, and before actual entry of the lessee, or commencement of his lease, the lessor should release to him all his right in the land; though this would not be sufficient to carry the reversion * by way of enlargement of his estate, yet would it extinguish the rent, because every deed must be taken most strongly against the grantor, and to be made to some purpose or other; and since this cannot operate on the estate to enlarge that, or carry any further interest to the lessee, yet it may well operate upon the rent which was issuing out of the land, and coming to the lessor, in respect of the land he had departed with, and therefore shall be construed to extinguish and determine that rather than it shall be totally void.

* *Vide* the next clause.

2 Mod. 251. And this way of executing leases for years, by an actual entry, was always held necessary at the common law, and for a considerable time after the statute of uses likewise, till the way was found out of conveying a freehold by a lease for a year, and a release thereupon, according to the common form now used. For it being found troublesome and inconvenient to put the lessee under a necessity of making an actual entry in all cases before a release could be effectual thereupon to enlarge his estate, especially where the lands lay at any considerable distance from the place where

the deeds were executed; therefore, to prevent this trouble and inconvenience for the future, they began to construe, that where the words and consideration were sufficient to raise a use, though it were but for a year, the statute would carry the actual possession after it, and consequently, make the lessee equally capable of enlarging his estate, by a release thereupon, as if he had actually entered by force and virtue of the lease: and the consideration, if it were valuable, though never so small, was looked upon to be sufficient for the raising of a use; and therefore 5 s. or such other consideration, came to be the standard in a lease for one year, which in time grew to be a thing merely of course and form, it being seldom or never paid, though the lessee, by his acceptance of the lease upon such consideration, was estopped to deny or aver against it. But because there were some opinions, that where a conveyance might enure two ways, either at the common law, or upon the statute, that there the common law should be preferred and take place; therefore, to bring the lease more effectually within the statute, they likewise inserted the words therein *bargain and sell*, which, together with the consideration, were held even at common law sufficient to raise a use; and then the statute, which came after, carried the possession accordingly, without any actual entry made by the lessee; and so the conveyance, by way of lease and release, grew in time to be the most common and easy method of transferring a freehold or fee, and has now continued for several years, almost to the disparagement of conveyance by livery. And to bring the lease still more effectually within the statute, it was afterwards used at the end of the lease to say, *That such lease was made to the intent, that by virtue of the statute of uses, the lessee might be in actual possession, and be thereby enabled to accept and take a grant and release of the freehold and inheritance thereof, &c.*

(N) Leases for Years, when to take Effect as a Reversion, when as a future Interest, and when neither the one nor the other.

IF one, having made a lease for life or years to *A.* of lands, after make another lease for years to *B.* of the same lands, or of the reversion of those lands, *habend.* the said lands, or the reversion of those lands, to the said *B.* *cum post five per mortem, resignationem, sursum redditionem, vel aliquo alio modo vacare contigerit*; in this case *B.* hath election to take such lease either as a reversion or a reversionary interest, if he can prevail for an attornment of *A.*, the tenant in possession; or if not, yet as a future *interesse termini* such lease will be good to take effect in possession upon the determination of the first lease, be it by death, surrender, forfeiture, effluxion of time, or any other way. The reason whereof is, that when the lessor has expressly departed with, and made over an interest to the lessee for such a time, and this interest cannot take effect in possession, because the lessor himself had not the possession to give, but

6 Co. 36.
Cro. Jac. 72.
Cro. Eliz.
152.
Leon. 171.
3 Leon. 17.
4 Leon. 23.
Bro. tit. Attornment,
41. 60.
Lit. § 576.
Dyer, 26. a.
58. 124. pl.
40. 125. pl.
44. 178.
233. pl. 10.
117. pl. 76.
350. pl. 18.
376-7.

Bendl. 286. but must therefore be carved and derived out of the reversion
 Plow. 148. which the lessor had, the lessee *primâ facie* hath a reversion, or
 550, 151. reversionary interest for the time, in the same manner as the lessor
 Bro. tit. or grantor himself had; but then the perfecting such lease as a
 Leases, 71. reversion, or a reversionary interest, to draw after it the rents and
 Yelv. 85. services, depending on the will and pleasure of the tenant in pos-
 Brownl. 156. session, whether he will attorn, and become tenant to such lessee or
 4 Co. 53. grantee, or not; if he thinks fit not to attorn, it cannot pass as a
 Dyer, 46. reversion or reversionary interest; yet this shall not totally invali-
 date and avoid such lease or grant, if by any other means it can be
 made good and become effectual; and this it may as a future *interesse termini*, to take effect in possession on the determination of the first lease, when or what way soever that happens; and therefore, as such, it shall take effect, rather than be absolutely void, when the lessor or grantor hath done all in his power to divest himself of the possession for so much a longer time. But then such second lessee hath an election to take it as a reversion, or reversionary interest only, when the lease is made to him by deed poll or indenture; for if it were made by parol, then he can only take it as a future *interesse termini*, to take effect in possession upon the determination of the first lease, when or which way soever that happens, and not as a reversion, or reversionary interest, to draw after it the rents and services, because a reversion cannot be granted to pass without deed; for a deed is of the very essence of the grant of a reversion, or reversionary interest, and without it no reversion, or reversionary interest can pass out of the lessor.

And this introduces a threefold distinction in the manner of making such leases for years, where there is a prior lease or estate then in being: 1st, When they are made by parol. 2^{dly}, When by deed poll. And, 3^{dly}, When by indenture or fine.

Plow. 421.
 b. 422. b.
 Bendl. pl.
 246.
 Cro Eliz.
 160. Plow.
 432. 521.
 Hutt. 105.
 Bro. tit.
 Leases, 48.
 Moor, 185.
 pl. 329.
 Dyer, 112.
 pl. 49.

As to the first, if one makes a lease to *A.* for ten years, and the same day makes a parol lease to *B.* for ten years of the same lands, this second lease is absolutely void, and can never take effect either as a future *interesse termini*, or as a reversionary interest, though the first lessee should forfeit or otherwise determine his estate, or though the first lease were on condition, and the condition broken within the ten years; neither shall the lessor have the rent reserved upon such second lease, but such second lease is absolutely void, as if none such had been made. The reason whereof is, because the first lease being made for ten years, the lessor during that time had nothing to do with the possession, or to contract with any other for it; and the second lease being made the same day, and for no longer term than the first ten years, could not pass any interest as a future *interesse termini* certainly; for the first lessee had the whole interest during that time; and his forfeiture or determination of it sooner, which was perfectly contingent and accidental, shall never make good the second lease as a future *interesse termini*, when at the time of making thereof it was absolutely void, for want of a power in the lessor to contract for it; and as a reversionary interest it cannot be good, for want of a deed; for a reversion, whether it be granted for life or years, not being

being capable of executing either by livery of seisin, or entry and transmutation of the possession, there can be no evidence of the creation or existence of such a grant, without a deed to ascertain it; and therefore a deed in such a case is as essential to the making good the grant, as livery of seisin or entry in the other cases, where they deal for the possession; and by consequence, this second lease not being good, either as a future *interesse termini*, or a reversion, must be absolutely void. But now if such second lease had been made for twenty years, then it had been good as a future *interesse termini* for the last ten years, and void for the first ten years, for the reasons before given. For the last ten years it had been good; because when the first ten years were elapsed, the second lessee might then execute, and reduce into possession by entry, as well as if it had been at first made in possession; for it had been good for the whole twenty years if the first lease had not stood in the way, and that can stand in the way no longer than it continues, and therefore by its determination lets in the second lease. But as a grant of the reversion such second lease could not be good, for want of a deed, for the reasons before given; neither could any attornment help it, or let in the second lease till the first ten years run out by effluxion of time.

But now, 2dly, If such second lease had been made by deed poll, then it might well enure as a grant of the reversion, and draw after it the rents and services of the first lessee, if he would consent to attorn, and by consequence, whenever the first lease determined by surrender, forfeiture, or otherwise, such second lessee having the immediate reversion must come in for the residue of his term; but without such attornment to make it operate as a grant of the reversion, this second lease, though by deed poll, would be absolutely void, as if it were made only by parol, because during the first ten years the lessor had no power to contract for the possession; and therefore if this grant could not take effect as a grant of the reversion, which was all the lessor had a power of, it must likewise be absolutely void. But if such second lease by deed poll had been for twenty years, then with attornment this would be a good grant of the reversion presently, to take effect in possession whenever the first lease determined; or if no attornment could be had, yet it would enure as a future *interesse termini* for the last ten years, and would be absolutely void for the first ten years, as much as if it had been made by parol.

*Vide the
authorities
cited above.*

But now, 3dly, and lastly, If such second lease for ten years had been made by indenture or fine, then this would have been good as a present lease, by reason of the estoppel to both parties by the indenture or fine, and therefore whensoever the first lease determined, the second lease should commence in possession; and in the mean time the second lessee, by reason of the estoppel would be obliged to pay the rent reserved in an action of debt. And if such second lessee could prevail for an attornment, then this lease would enure as a grant of the reversion, and draw after it the rents and services of the first lessee, and would take effect in possession when-

*Vide the
authorities
to the first
distinction.*

ever

ever that determined ; but without such attornment, though the second lease would be good between the parties, by reason of the estoppel, yet not as a reversion ; and therefore such second lessee could have no remedy for the rents and services of the first lessee.

Co. 155. a.
Cro. Elz.
322.
Mow. 422.
2. 433. a.

So, if one had made a lease for life, or for eighty years, if the lessee should so long live, and after, by indenture, let the same lands to another for years, to begin presently, and then the first lease determined by death, surrender, or forfeiture, the second lessee should have the lands in possession presently, for the residue of the years, because such second lease, by reason of the estoppel, took effect between the parties presently, and therefore shall come in possession whenever the first lease is out of the way. But if such second lease were only by deed poll, then there must be an attornment to make it good as a grant of the reversion, as there must likewise in the other case, where it was made by indenture ; and without such attornment the second lease could only take effect in possession upon the determination of the first lease by the death of the lessee, according to the express limitation, and not upon any sooner or other determination by surrender, forfeiture, or otherwise ; much less, if such second lease were by parol, could it take effect upon any other determination of the first lease : for though in these cases the first lease, depending upon the life of the lessee, was uncertain how long it would continue, yet so long as it did continue, the first lessee had the sole and absolute possession, and the lessor no power to contract for any thing but his own reversion during that time ; and therefore if his second lessee cannot attain the reversion, the contract can take no effect for the possession till the death of the first lessee, because that being the lessor's own limitation affixed to such lease, he cannot deal for the possession before that time comes ; and therefore, no accidental determination of the lease sooner shall let in the second lessee, unless he can prevail for the reversion by attornment of the first lessee, in case of the lease by deed poll, or unless in case of the indenture, he shall, by reason of the estoppel, be let in whenever the first lease is out of the way, whether he obtained an attornment or not.

3 Leon. 17.
4 Leon. 23.
5 Co. 113.
Mallorie's
case.

But in all the cases before-mentioned, if such lease by indenture or deed poll were by way of bargain and sale for years, then, it should seem, it would pass as a reversionary interest presently, without any attornment, by force of the statute of uses, and it being only for years, there would need no enrolment of the indenture or deed poll.—And *note* ; By the statute of frauds and perjuries, 29 Car. 2. c. 3. no parol lease for above three years is to have any other effect than only as a lease at will ; so that such parol leases now for ten or twenty years are out of doors.

(O) Leases for Years by Estoppel, how far and against whom such Leases are good.

IF one makes a lease for years, by indenture, of lands, wherein he hath nothing at the time of such lease made, and after purchases those very lands, this shall make good and unavoidable his lease, as well as if he had been in the actual possession and seisin thereof at the time of such lease made; because he having, by indenture, expressly demised those lands, is by his own act estopped, and concluded to say he did not demise them; and if he cannot aver that he did not demise them, then there is nothing to take off or impeach the validity of the indenture, which expressly affirms that he did demise them, and consequently, the lessee may take advantage thereof, whenever the lessor comes to such an estate in those lands as is capable to sustain and support that lease. And this estoppel by indenture is so mutual and reciprocal, that if a man takes a lease for years by indenture of his own lands, whereof he himself is in actual seisin and possession, this estops him during the term to say the lessor has nothing in the lands at the time of the lease made, but that he himself, or such other person, was then in actual seisin and possession thereof; for by acceptance thereof by indenture, he is, for the time, as perfect a lessee for years, as if the lessor had at the time of making thereof the absolute fee and inheritance in him. But if such lessee of his own lands, being ejected by the lessor, should bring an ejectment, and the lessor should plead not guilty, and give the lease and some matter of forfeiture thereof, in evidence, to support his plea without pleading, and rely on the estoppel, and the jury should find the special matter, *viz.* that the defendant had nothing in the lands at the time of such lease made, but that the plaintiff himself was then in actual seisin and possession thereof, whether the court, upon this verdict, are bound to adjudge according to the truth of the case, *viz.* that such lease by one who had then nothing in the lands was void; or if they are to adjudge according to the law, working by way of estoppel upon such lease by indenture, seems a doubt upon all the books. But my Lord *Coke* lays it down for a rule, that the jury do well to find the truth, *viz.* that the lessor had then nothing in the lands; but then, upon such finding, the court is to adjudge, according to the operation of law upon the estoppel wrought to both parties by the indenture, that they are bound. But if the jury, understanding that the lessor had nothing in the lands at the time of the lease made, and that therefore his lease could not be good in fact, but only by way of estoppel, and inferring from thence that they, who are sworn to say the truth, were not bound by such an estoppel, which was plainly against the truth, should therefore give a general verdict against the lease, that the defendant was guilty of the ejectment; in this case, says my Lord *Coke*, such jury are liable to an attain. And this seems the better opinion; for though it be true that the jury are not bound by the estoppel,

Co. Lit. 47.
227. a.
Plow. 434.
4 Co. 53.
Cro. Eliz.
140.
Sav. 98.
Owen, 96.
Leon. 206.
Cro. Eliz.
362. Moor,
pl. 323.
2 Brownl.
150. Cro.
Car. 110.
2 Roll.
Abr. 871.
Cro. Jac. 73.

4 Co. 53.
Rawlins's
case. Co.
Lit. 47. b.

estoppel, and therefore may find that the lessor had nothing in the lands at the time of the lease made, which is a truth of fact, the lessee is estopped to affirm, and is the only subject matter of the estoppel; yet the consequence of such estoppel, and how far the lease is made good thereby against the parties, is matter of law, and not of fact; and therefore if they take upon them, first, to find that the lessor had nothing in the lands at the time of the lease made, and then to find that such lease is void; or, which is all one, to find that such lease was void, because the lessor had then nothing in the lands, as the essential cause which induced them to find such lease to be void, or that there was no such lease; in this they take upon them to judge the matter of law, and in so doing exceed their duty, and, consequently, if they are mistaken, lay themselves open to an attain; for, in truth of fact, there was such lease made, and, in truth of fact, the lessor had nothing in the lands at the time of making thereof; and all this is their duty, and belongs to them to find; but whether such lease, so circumstanced, be good, or void, is matter of law, for the court to adjudge, upon these circumstances; and therefore, if they will take upon them to anticipate the judgment of the court, by giving their own judgment thereon, they must do it at their own peril, and if they mistake, be liable to an attain.

Co. Lit.
47. b.
Roll. Abr.
371.

But if such lease for years were made by deed poll of lands wherein the lessor had nothing, this would not estop the lessee to aver that the lessor had nothing in those lands at the time of the lease made; because the deed poll is only the deed of the lessor, and made in the first or third person; whereas the indenture is the deed of both parties, and both are, as it were, put in and shut up by the indenture, that is, where both seal and execute it as they may and ought; for otherwise, if the lessor only seals and executes the indenture, the lessee seems to be no more concluded than if the lease were by deed poll; for it is only the sealing and delivery of the indenture as his deed that binds the lessee, and not his being barely named therein, for so he is in the deed poll; but that being only sealed and delivered by the lessor, can only bind him, and not the lessee, who is not to seal and execute it. And it should seem, that such lease by deed poll binds the lessor himself as much as if it were by indenture, because it is executed on his part with the very same solemnity, and therefore it should seem, he is bound by such lease by way of estoppel.

Cro. Eliz.
37. 700.
Co. Lit.
352. a.

And yet it is generally said, that these estoppels ought to be mutual, otherwise neither party is bound by them: therefore, if a man takes a lease for years of his own lands from an infant or feme covert by indenture, this works no estoppel on either part, because the infant or feme, by reason of their disability to contract, are not estopped; therefore, neither shall the lessee be estopped, because all estoppels ought to be mutual.

Roll. Abr.
371.

So, if a man takes a lease for years of his own lands by patent from the king, rendering rent, this shall not estop the lessee, as an indenture between common persons in such case would do; because the king cannot be estopped; for it cannot be presumed the king

king would do wrong to any person, and therefore being deceived in his grant makes it absolutely void. And if he be not estopped, neither shall the lessee; because all estoppels ought to be mutual. But perhaps there may be some difference between these cases of a bare acceptance of a lease from such persons, as by reason of their imbecility, incapacity, or other impediment arising from their own persons, could not make such lease, but that the same was either absolutely void, or at least voidable, on their part; and therefore the lessee may shew such incapacity, to avoid them, as made by persons who wanted power or ability to contract; and so the whole contract must fail, not for want of a sufficient estate in the lessors, (for if they were of full age, and sole, &c. that would not be material,) but for want of a sufficient power or ability to contract. But when such lease is made by a man of full age, though by deed poll, why this should not bind and estop him as well as if it were made by indenture, seems hard to understand; for he hath executed it on his part with the same solemnity; and though it cannot bind or estop the lessee, because he never executed it, yet why that should invalidate it on the lessor's part, whose deed it was, and who did all he could to bind himself, does not seem very intelligible. Besides that, the books, which put the case of the lease by deed poll, saying only that the lessee is not estopped thereby, seem to allow that the lessor is notwithstanding estopped; for otherwise they would take notice of their being both at large, as they do in other cases.

If lessee for years accepts a lease for years of a stranger by indenture, who hath nothing in the reversion, this is a good lease by way of estoppel between them, and not a confirmation; for nothing appears that the lessor knew the lessee then had any thing in the lands, and then it is the same with the other cases, and works by way of a bare estoppel; but *Fenner* thought it a confirmation, against all the other judges.

Roll. Abr.
871. Style
and Herring.

If one lets lands to me, by deed enrolled, unknown to me, and brings debt upon the lease, I may say *ne lessu pas*, as *Littleton* held; but by all the justices, he who made such lease is concluded to say the contrary. This case seems to be an authority in point to establish what has been laid down, that in case of a deed poll, (as this which is called a deed enrolled must be intended to be,) the lessor himself is estopped, though the lessee be at large; and this cannot be intended an indenture, because then the lessee would have been estopped likewise, if he had sealed it, which in this case it appears he did not, because it was unknown to him, and therefore was not estopped, whether it were by indenture or deed poll.

Bro. tit.
Leases, 36.
7 E. 4. 29.

These estoppels continue no longer on either part than during the lease, for as they began at first by the making of the lease, so by determination of the lease they are at an end likewise; for then both parts of the indenture belong to the lessor. Cro. Eliz. 36.

Co. Lit.
47. b.
4 Co. 54. a.
8 Co. 44.
Roll. Abr. 877.

When an interest actually passes by the lease, there shall be no estoppel, though the interest, purported to be granted, be really greater than the lessor at that time had power to grant; as if *A.*,
lessee

Co. Lit.
47. b.
Vent. 358.
Et vide

Skin. 3. lessee for the life of *B.*, makes a lease for years by indenture, and
 Carth. 247, after purchases the reversion in fee, and then *B.* dieth; *A.* shall
 248. avoid his own lease, though several of the years expressed in the
 Salk. 275. lease are still to come; for he may confess and avoid the lease
 pl. 1. which took effect in point of interest, and determined by the death
 of *B.* So, if lessee for ten years makes a lease for twenty years,
 and afterwards purchaseth the reversion, yet it shall bind him for
 no more than ten years, for the same reason; because when he
 made a lease for twenty years, this was certainly a good lease for
 ten years, and so far an interest passed, which he may confess, and
 avoid it for the residue, by saying that he had no more than for
 ten years in it himself; *sed quare* of this? for the reason seems not
 satisfactory.

2 Lev. 140. In ejectment, plaintiff declared of a lease for five years, and
 3 Keb. 490. upon not guilty pleaded, the jury found that the lessor of the
 Roe and plaintiff had only a term for three years in the lands leased, &
 Williamson. *fi, &c.* Hale held this verdict against the plaintiff; for the judg-
 ment should be, that the plaintiff *recuperet terminum suum præ-*
dictum, which is five years; and here the lessor's interest does not
 continue so long, and perhaps the defendant may be the rever-
 sioner after the five years ended, and then by this means the plain-
 tiff's lessor will recover the land for two years more than he hath
 right to do; and he said, that for this reason, he had before caused
 another plaintiff to be nonsuit; *Wild* was of the same opinion,
 but *Twissden* inclined *cont. & adjournatur*.

Co. Lit. If a man takes a lease for years of the herbage of his own land
 47. b. by indenture, this is no conclusion to say that the lessor had no-
 Roll. Abr. thing in the lands at the time of the lease made, because it was
 871. not made of the lands themselves.

Roll. Abr. If baron and feme join in a lease for years by indenture, ren-
 377. Cro. dering rent, where the baron hath all the estate, and the wife no-
 Eliz. 701. thing; in this case, after the death of the baron, the lessee, in an
 Breerton v. action of debt brought by the feme, shall not be concluded to
 Evans. say, that at the time of the lease made the feme had nothing in
 the lands; for this shall not enure by way of estoppel, because an
 interest actually passed, though not from the feme. But another
 reason given is, because the feme being covert was not estopped,
 and, by consequence, neither shall the lessee, because all estoppels
 ought to be mutual.

Co. Lit. If tenant of the land, and a stranger, join in a lease for years
 45. a. by indenture, this is the lease only of the tenant, and the confirm-
 Roll. Abr. ation of the stranger; and yet the lease operates, as to the stran-
 377. Cro. ger, by way of conclusion, and so it does to the lessee with respect
 Eliz. 701. to the stranger, because he having nothing in the lands, the in-
 denture could no otherwise take effect as to him.

Co. Lit. If *A.* seised of ten acres, and *B.* of other ten acres, join in a
 45. a. lease for years by indenture, these are several leases, according to
 Roll. Abr. their several estates, and no estoppel is wrought by the indenture
 877. to either party, because each have an estate whereout such lease
 for years or interest may be derived; and the reason why estoppels
 at any time are allowed, is, because otherwise, when the party
 hath

hath nothing in the lands, the indenture must be absolutely void, which would be hard to say, when he hath, under hand and seal, done all in his power to make it good; and since it can be good no otherwise, it shall be good by estoppel, rather than be absolutely void. But when an interest passes from each lessor, the indenture works upon such interest to carry that, and therefore leaves no room for its operating by way of estoppel. But since both equally joined in the lease, without distinguishing the several interests they had therein, the indenture works by way of confirmation, with respect to each from whom the whole interest did not pass; that is, as *A.*'s confirmation for *B.*'s part, and as *B.*'s confirmation for *A.*'s part; for since the lease of the whole was undistinguished, and by reason of the several interests that passed from each, excludes any estoppel, therefore, rather than the indenture shall be void, with respect to the part of each other, it shall be construed a several confirmation by one of the other's part, and by the other of the other's part, which is the least operation the indenture can have with respect to each, from whom no interest passes, without being absolutely void.

So, if two tenants in common of lands join in a lease for years, by indenture, of their several lands; this shall be the lease of each for their respective parts, and the cross confirmation of each for the part of the other, and no estoppel on either part; because an actual interest passes from each respectively, and that excludes the necessity of an estoppel, which is never admitted, if by any construction it can be avoided, as being one of those things which the law looks upon as odious, because it chokes and disguises the truth.

Roll. Abr.
377.

But if two joint-tenants for life, or in fee, join in a lease for years by indenture, reserving rent to the one of them only, this shall give him the rent exclusive of the other; and here the estoppel turns not then upon the interest passed by the lease, for that is several, according to their several rights, as in the other cases, which excludes any estoppel; but it turns upon the reservation of the rent, which being made in this manner, to one exclusive of the other, by indenture, works an estoppel against all the parties to say the contrary; and though the rent issues out of one part as well as the other, yet it not being part of the thing demised, but moving, as it were, rather by way of grant from the lessee after the lease made, the lessors are considered as accepting it in this manner by indenture, which concludes them as well as it doth the lessee. But if the lease had been by parol, or deed poll, reserving rent to the one joint-tenant only, this would not have excluded the other joint-tenant from an equal share therein, because this reservation coming, as it were, by way of grant from the lessee, and being only by parol, or deed poll, could not estop or conclude the lessors, who, with respect to the rent, were as it were grantees, and only passive therein; and the rent shall follow the reversion in proportion to their several estates in that, as the cause for which the rent was reserved or granted in that manner, and so let in both to an equal participation thereof.

Co. Lit.
47. a.
Roll. Abr.
378.

Roll. Abr.
878. Moor,
pl. 939.
Milliner v.
Robinson.

If two coparceners join in a lease for years, by indenture, of their several parts, this is said in one book to be but as one lease, because they have not several freeholds therein, but only one, as both making but one heir, and therefore shall join in an assise. But *Moor* is *cont.* where in ejectment the plaintiff declared of a lease by two coparceners *quod dimiserunt*; and exception being taken to it, the exception was allowed, because the lease was several as to each coparcener, for her respective moiety. And this seems the better law, because though they have but one freehold with regard to their ancestor, and therefore if they are disseised shall join in an assise, yet as to their disposing power thereof they have several rights and interests, so that neither of them can lease or give away the whole.

Roll. Abr.
874. 876.
Omelaugh-
land v.
Hood.

If *A.* mortgages lands to *B.* upon condition to re-enter on payment of 10*l.* and after *A.* before the day of payment is come, being in possession, makes a lease for years, by indenture, to *C.*, and then after performs the condition, this shall make the lease to *C.* good against himself by estoppel; and it was farther adjudged, that even the feoffee of *A.* should be bound by this lease, which took its effect only at first by estoppel; because he coming in under one who was estopped, should be himself estopped likewise, which was still a stronger case than the first. And this was adjudged in *Ireland*, and afterwards affirmed on a writ of error here, and seems a very reasonable judgment; for if a subsequent purchase shall make good a lease of lands by indenture, though the lessor had nothing in those lands at the time of the lease, and therefore his lease at first could only take effect by estoppel; much more in this case, where the lessor had a possibility of coming into the lands again, shall his performance of the condition after make good the intermediate lease. And so it should seem too if the condition were broken at the time of the lease, so as he had then nothing but an equity of redemption; yet if he should after be admitted to redeem in Chancery, this would make good the intermediate lease which took effect at first only by estoppel.

Co. Lit.
45. a.
Dyer, 234.
Moor, pl.
196. Poph.
57. Moor,
pl. 939.
6Co. 14, 15.

B. tenant for life of *C.*, and he in the remainder or reversion in fee join in a lease for years by indenture; this, during the life of *C.*, is the lease of *B.*, who then only had the present interest in the lands, and the confirmation of him in the remainder or reversion; but after the death of *C.* then this becomes the lease of him in the reversion or remainder, and the confirmation of *B.*, for the lessors having several estates in them in several degrees, the lease shall be construed to move out of each one's respective estate or interest as they become capable of supporting thereof; which is the most natural and useful construction of the lease, especially as there can be no estoppel in this case, by reason of the several interests which passed from each; and therefore during the life of the tenant for life, if the lessee, being evicted, should declare of a lease by both, this would be against him, as was adjudged, because for that time it was only the lease of the tenant for life.

(P) Leases for Years and future Interests, how far they may be barred or destroyed, and how far not, and where an Entry before the Term begun is a Disseisin.

IT has already appeared, that all leases for years at the common law, when they come *in esse*, are to be executed by the entry of the lessee. We shall therefore now consider what care the law has taken for the preservation and security of such leases as are limited to begin at a future time, and so cannot be executed by entry presently; what power the lessee hath over such an interest, and whether by any, and by what acts, either of the lessor, or strangers, the same may be barred and prevented from ever taking effect.

As to future interests, if one make a lease for years, to commence after the death of a tenant for life, or after the end of a lease for years then in being; and after the death of the tenant for life, or expiration of the term for years, a stranger enter by tort, yet may the lessee of the future interest grant over his term for years, before or without any entry made, and thereby transfer over his power of entering and reducing it into possession to the grantee: for till entry of the lessee of such future interest, the lease is not executed, but remains in the same plight as it was upon the first making thereof, and then no intermediate acts, either of the lessor, or of strangers, can disturb or hurt it; because whoever comes to the possession, whether by right or wrong, takes it subject to such future charge, which the lessee may execute by his entry whenever he thinks fit, as by a title prior and paramount to all such intermediate violations of the possession. But if the lessee of such future interest had once entered after the death of the tenant for life, or end of the lease for years, and had after been put out, then he could not grant over his term and interest to a stranger, because by his entry the lease was actually executed, and being after defeated by the entry of another, he had only a right of entry left in him; which right of entry the law will not suffer him to transfer over to a stranger any more than a right of action; and for the same reason, because in both cases it may encourage champerty and maintenance: but in the other case, where he hath not entered, he only transfers over such interest as he himself had, which the tortious entry of the stranger had not disturbed or altered from what it was at the first making thereof.

So, if one makes a lease for years, to begin two years hence; after the two years expired, before any entry, and whilst the lessor continues still in possession, the lessee may grant over his term and interest to another; because his *interesse termini* was not divested or turned to a right, but continued in him in the same manner as it was at first granted; and in the same manner he

Cro. Eliz.

15.

5 Co. 124.

3 Leon. 136.

158.

3 Mod. 198.

Cro. Eliz.

127.

Leon. 118.

Wheeler v.

Thorough-

good.

transfers it over to another, who by his entry may reduce it into possession whenever he thinks fit.

5 Co. 123.
Cro. Jac. 60.
Saffin's case.
Leon. 99.
3 Mod. 198.
Ld. Raym.
179.

One made a lease for years, to begin after the end or determination of a former lease for years then in being; the first lease determined; and before entry of the second lessee, he in reversion entered, and made a feoffment in fee, and levied a fine with proclamations, and five years passed without entry or claim of the second lessee; and if his term was barred, was the question? And it was adjudged, that by this fine and non-claim his term was barred, because after the first lease expired, the second lease was actually then come *in esse*, and reducible into possession by an entry presently; and then his not entering, which was his own fault, and laches, could not stop the operation of the fine from running against him. But if such fine had been levied during the continuance of the first lease, there, it was agreed, that the operation thereof should not begin to run out against the second lessee till the first lease were determined; because till then the second lease was only an *interesse termini*, which the second lessee could not reduce into possession by any entry till the first lease determined, and so was not obliged to take notice of the acts of strangers, or of the ter-tenant in possession; for if such future interest might be divested before it came *in esse*, the lessee or grantee thereof having never entered, would have no means to re-vest it, and therefore till it comes *in esse*, the law takes care and secures it to the lessee or grantee in the same manner as it was at first granted: but when the first lease is at an end, then the second lessee is to take care of it himself; and if he suffers five years to elapse after that time without entry or claim, this will bar such interest, because his right then commences in possession, and thenceforth the operation of the fine begins to run on against him. And where in *Noy* it is held, that if *A.* leases to *B.* for years, but yet *A.* still continues in possession, and after levies a fine with proclamations, and five years pass, that this does not bar the term of *B.*, but only carries the reversion of *A.*, this case was denied by *Twissden* to be law, for till the entry of *B.* the lessor hath no reversion; and therefore the fine can only operate on the possession.

Noy, 123.
Archbold
v. Cook.
Vent. 81.
Sid. 459.

2 Leon. 99.
Cro. Eliz.
169. Roll.
Abr. 605.
Dyer, 89.
96. 2 Roll.
Abr. 120.

As the lessee must enter when his lease continues in possession, so if he enters before, this is a disseisin: therefore, where one brought debt for rent, and declared upon a lease 29 *Septemb. habendum* from the feast of *St. Mich.* next ensuing for twenty-one years, rendering 10*l.* per ann. rent, *virtute cujus* defendant 29 *Septemb.* entered, &c. on *nil debet* pleaded, and found for the plaintiff, it was moved in arrest of judgment, that here, by the plaintiff's own shewing, there is no rent in arrear, for he says *virtute cujus* defendant 29 *Septemb.* entered, which is a day before the commencement of the term; and then such entry is a disseisin, because he hath then no right to enter: and this the court clearly agreed, and that no continuance of possession, though after the term actually begun, should purge the disseisin or alter the estate of the lessee: but yet they agreed that debt lay for the rent in

respect of the privity of contract upon the lease made, but that the disseisin having gained a tortious fee, that should not give way to the term for years, though it were legal, being but a chattel.

So, where *A.* made a lease to *B.* 23 *Septem. habendum* to him for eighty-one years from *Mich.* next ensuing, if *C.* should so long live, and from and after the day of the death of *C.* for thirty-one years more; the lessee enters the 23 *Septemb.*, and so, before the commencement of the term, continues in possession for some years; then the lessor re-enters, and the lessee being out of possession after the death of *C.* and during the continuance of thirty-one years, assigns over that term to the plaintiff's lessor, who being kept out of possession, brings ejectment, and recovered. 1. It was held, that the term not being to begin till *Mich.*, this was till then a future interest, and the lessee's entry before was a disseisin, and not a possession, by virtue of the lease. 2. That whether this lease for thirty-one years were only a continuance of the first term, and that both together made but one term, as *Bridgeman* held, because the last day of the life of *C.* shall be conjoined to the first day of the thirty-one years, and so no fraction be allowed, especially being for eighty-one years, which *B.* cannot be supposed to outlive; or whether they were two distinct terms, as others held; yet either way it was not turned to a right by the entry of the lessor, because *B.* was not possessed by virtue of the term, but by disseisin, and to purge that was the entry of the lessor; for if a stranger had entered after *Mich.*, and disseised the lessor, this would not have turned the term to right, because as to that the time for entry of the lessee was not come, nor was his entry in respect of that; no more will the entry of the lessor turn it to a right, and then it was well assignable to the plaintiff's lessor, especially if it should be taken as a future interest, as some held it should; for then the lessee was never in possession by virtue thereof, and consequently the lessor's entry could not turn it to a right.

But where one declared of a lease 16 *April, habendum* from the *Annunciation* last past for ten years, *virtute cujus intravit, & habuit tenementa prædicta.* from the said *Annunciation*; this was held good, and that the lessee was no disseisor; for it shall be intended that he entered and occupied before by agreement, and a diversity was taken between this case, where the commencement of the lease is limited from a time past, and where it is limited to begin at a time to come; there, the entry of the lessee before that time, is a disseisin.

Lev. 45.
Keb. 54.
Hennings v.
Brabazon.

Cro. Eliz.
905.
Waller v.
Campian.

(Q) How far, and by what Means, Leases for Years in Trust to attend an Inheritance may be barred or destroyed.

Cro. Car.
310. *Isham*
v. *Morris*.

(2) 2 Vent.
329.
1 Sid. 459.
2 Lev. 272.

IF lessee for years assigns over his lease in trust for himself, and after purchases the inheritance, and occupies the land, and then levies a fine with proclamations, and the lessee does not claim this lease within five years after the fine levied, this fine and non-claim will bar the interest of the lessee, though he who levied the fine had himself the possession by reason of the trust; for this trust passed included in the fine, and the trustee not making claim within the five years, his interest is barred thereby, and, consequently, so is the interest therein of the *cestui que trust*. But note; it appears in other books (a), where this resolution is cited, that the conusee was a purchaser of the estate, and then having no notice of the term, nor having made any agreement for it, to have it assigned in trust for himself, if the fine had not barred it, and it might have been set up against his purchase, he would have been so far cheated. But it is said, it would have been otherwise, if by agreement, this term had been to be assigned in trust for the conusee; and that, upon very good reason: for he who hath the inheritance in trust, for whom a term or estate by extent is assigned, must be taken as tenant at will to his trustee, and then his possession is the possession of the trustee; the consequence of which is, that the fine levied by him who hath the inheritance will work only upon that, when it appears that it was so intended, and that the term should be kept on foot, and not barred; whereas in the case of *Isham* and *Morris* there does not appear to have been any such intention, nor does it appear that the conusee knew any thing of the term.

Hanmer v.
Eyton,
Comb. 67.
See also
1 Ch. Rep.
27. 33.

Hard. 400.
Focus v.
Salisbury.

[So, where *A.* had a term of years vested in him for securing children's portions, and *B.* being in possession levied a fine, and five years passed without any claim being made; it was resolved by the Court of King's Bench, that, admitting the term was in trust, it was barred by the fine,]

A. seised of lands, for continuance thereof in his name and blood, &c. makes a lease to *B.* for five hundred years, in trust for himself during life, and after in trust for his brother, and so to others; and after, *A.* being in possession according to the trust, covenants with *D.* to stand seised of those lands, upon the same considerations as in the lease, to the use of himself for life, with remainders over, as in the lease, and upon the same trusts; and that the said lease, and all estates made or to be made by him should be to the same uses and trusts; and then *A.* levies a fine, and five years pass, *A.* still continuing in possession according to the trust, and after *A.*'s death the lessee enters; and if this lease was barred by the fine and non-claim for five years, was the question? No judgment appears to have been given: but *Hale* seemed to

to be of opinion that it was not, because here appeared no intent to bar it; for *A.* was but tenant at will, and the fine did not displace the lease; as, if lessee for years levies a fine, and five years pass, the lessor is not barred, because *nihil operatur* by the fine, and *partes finis nihil habuerunt* may be pleaded to it: otherwise it would be, if such fine had been levied by the tenant for life: therefore, where lessee for years intends to levy a fine, it is usual for him first to make a feoffment, whereby he transfers the whole and present possession and fee to the feoffee, and then the fine operates upon the whole estate so united in the feoffee; but here *the lease for years was antecedent to the estate of the lessor* upon which the fine operates, and was subsisting in another person, viz. in the lessee, at the time of the fine levied. And he cited the Duchefs of Richmond's case (*a*) in *C. B.*, which is said to be the same *in terminis*, and to be so adjudged, 1. Because the lessor was only a tenant at will, and there was a mutual confidence between them: 2. By reason of the privity that was between them. And he also cited one *Heal's* case, where *A.* conveyed lands in fee to *B.*, with a covenant to make further assurance, then *B.* let to *A.* for forty years, and then, on request, *A.* makes further assurances; the lease is barred without precedent agreement to the contrary, for that would have saved the lease, and then the further assurance would have been taken only to operate by way of corroboration and further confirmation of the lease. But the principal case in *Hard.* seems to be very darkly put in the book; for it does not appear to whom the fine was levied; and the notion of the term being antecedent to the fine, and therefore not barred for that reason, seems strange; for if it were subsequent, it could not most certainly be touched by the fine; and there in another book this case is cited as a case in point, that the term is barred by the fine; and this seems agreeable to some of the following resolutions.

It was held *per curiam*, that a fine levied in pursuance of a trust cannot destroy any lease made by *cestui que trust*. But though a fine levied by *cestui que trust* does not destroy or extinguish the trust, yet it is not safe to do it, for the danger of not being able to prove an agreement to the contrary.

A. seised in fee makes a lease to *B.* for an hundred years, in trust to attend the inheritance, *B.* enters, then *A.* enters, and receives the profits, and after makes a lease for fifty-four years, and covenants to levy a fine *sur consance de droit*, to confirm that lease, and a fine is afterwards levied accordingly, and five years passed without any claim made by *B.* And it was adjudged in *C. B.* and affirmed afterwards upon error in *B. R.* 1. That when *A.* entered upon *B.* he was but tenant at will to him, to which estate it is not always requisite that there be the express consent of both parties; but if there be any thing tantamount, it is sufficient; as here the trust implies, that the lessor shall take the profits, being *cestui que trust*, which includes at least an estate at will. 2. That when *A.* made the lease for fifty-four years, though this would not be a disseisin, because the reversion was in the

2 Vez. 431.

(*a*) Corbet v. Stone, Sir Thomas Raym. 340.

Lev. 271.

Keb. 24-5.

Vent. 55.
80. Sid.
349. 458.
Lev. 270.
2 Keb. 521.
597. 650.
Freeman v. Barnes.
3 Mod. 196.
S. C. cited.

lessor himself, who made that lease, yet by this the lease for an hundred years was divested, displaced, and turned to a right. And, 3. that being so divested, this was barred by the fine and non-claim. And it was held, that *A.* only should have the term of an hundred years, divested or not, and not *B.*, who was but his trustee; and in this case *A.* hath made his election by levying the fine to corroborate the term of fifty-four years, and there is no reason that *A.* should have the land against his own fine: besides, if the term of an hundred years should not be barred by the fine and non-claim, then *B.* must have it, which was never intended; and it is but reasonable such term should be subject to be barred or extinguished by *cestui que trust* of that and the inheritance. And a general rule was taken in this case, that when the lessee at will, or he who enjoys the land by express or implied assent of his grantee or feoffee, makes a lease for years, or levies a fine, this shall be construed an ouster, disseisin, or bar, when such construction tends to the establishing of a lawful estate, as in the principal case; but when such construction tends to the destruction of an honest estate or interest, then such lease or fine shall be no ouster, disseisin, or bar; and therefore *Keeling*, Chief Justice, put these two cases: If one makes a lease for years, for security of money by way of mortgage, and as the course is, continues in possession, and takes the profits, and then levies a fine to *J. S.*, and pays the interest duly, and the five years without notice or claim pass, this shall be no bar to the lease of the mortgage: So, if one purchases lands, and for the better security hath a long lease assigned to *J. S.* in trust to attend the inheritance, and then take the inheritance to himself by fine, and five years pass, and there are mortgages made in time after the first lease made, and before the fine levied; yet such fine does not destroy the first lease to *J. S.*, but the purchaser may use it to defend himself against the incumbrances; and he thought this difference would reconcile all the books.

[See *acc.*
2 *Vez.* 482]

3 *Mod.* 195.
Smith v.
Pierce.

One by will devises lands to trustees for ninety-nine years, in trust for the payment of his debts and legacies, remainder to *A.* his brother in tail; but if *A.* gave security to pay the said debts and legacies, or should pay the same within such a time, then the trustees should assign the term to him, &c. *A.* entered after the death of his brother, with the assent of the trustees, and received the profits, and paid all the legacies, and also all the debts but 18 *l.* and afterwards *A.* levies a fine to the use of himself for life, remainder to his wife for life, with divers remainders over, and dies, leaving his wife, and one only daughter, his heir at law; the wife entered, and five years were past without any claim; and now the daughter, in the name of the trustees brought an ejectment; and the questions were, 1. Whether this term for ninety-nine years was bound by the fine and non-claim? 2. Whether it was divested and turned to a right at the time of the fine levied? for if it were not, then the fine would not operate upon it. No judgment appears to have been given in it; but upon the difference taken in *Freeman* and *Barnes's* case, it should seem not

not to be barred; for then it must turn to the prejudice of honest creditors, who were strangers and third persons; and *A.* by his entry on the trustees could be only tenant at will, because his entry was with their consent, and no manner of intent appears in him to divest their estate or interest, and then his fine shall operate only on his own estate-tail, like a fine levied by a mortgagor, who is but tenant at will to the mortgagee, and whose acts being by permission of the mortgagee, shall not turn to his prejudice; though some said, the five years and non-claim passing in the lifetime of the wife, who was the survivor, made a great difference in the case; *ideo quære.*

If one takes an assignment of an estate extended upon a statute in the name of *J. S.* in trust to attend the inheritance which he hath in himself, and after he by lease and release, and fine levied in pursuance thereof, conveys that reversion and inheritance to another, and five years pass without any claim made by *J. S.* the trustee; yet this will not bar the estate or interest upon the extent, if it appears that the conusee of the fine was a purchaser of the whole estate, and so after his purchase *J. S.* to be trustee for him of the statute interest; for in such case the fine shall operate only upon the inheritance, and not to the barring of the statute interest, which is to attend and go along with the inheritance by way of trust for the purchaser. But if the purchaser had no notice of such statute interest standing out, nor was by agreement to have the trust thereof upon his purchase, then, rather than he should be cheated thereby, the fine of *cestui que trust* should operate to the barring of his own trustee.

2 Vent. 329,
330.
Dighton v.
Greenvil.

Upon evidence to a jury at the bar, on trial of an issue out of Chancery, it was agreed, that if one makes a lease for an hundred years in trust for himself and his wife, and afterwards they both join in levying a fine to a purchaser, for a valuable consideration, who had no notice of this lease in trust, though the fine does not convey the term itself to the conusee, the estate in law being in the trustee, yet this destroys the trust, so that the lease shall not hurt the purchaser.

3 Keb. 564.

These reasons and resolutions seem to make it manifest, that in the case of *Focus* and *Salisbury*, if the conusee of the fine were a purchaser for a valuable consideration without notice of the term, then the fine would so destroy the trust of that term, that it should not hurt him: but if the fine were only in pursuance and corroboration of the former estates, then there would be no reason in the world that it should operate so as to destroy the term.

Hard. 400.

(R) Leases for Years, when merged by Union with the Freehold or Fee.

ANOTHER way, whereby a term for years may be defeated, is by way of merger, where there is an union of the freehold or fee and term for years in one person at the same time: in this case

case

case the greater estate merges and drowns the less; because they are inconsistent and incompatible. And yet there are several exceptions out of this rule, not only where such union is transitory, but even where it is permanent and continuing.

Co. Lit. First then, if a man makes a lease for years to *A.* and afterwards makes a feoffment in fee to *B.* with a letter of attorney to *A.* to make livery, and he makes livery accordingly, yet this shall not drown or extinguish his term, because he did it only as servant to the lessor, and in his stead and right, and the feoffee after livery made is in by the lessor, and claims nothing from the lessee: neither shall his term pass, merged, or be confounded in the fee, which by the livery he gave to the feoffee, because he gave it only in right of the lessor, and not in his own right; though perhaps, to secure his term, and settle the reversion (which was all that was intended to pass) in the feoffee, it may be proper for him after such livery to make an entry for his term, because the livery gave the actual possession, though the agreement and intent of the parties will direct it so as to transfer only the reversion expectant upon that term after the lessee hath re-entered.

7 Co. 48. a. If the lessor enfeoffs his lessee for years to several uses, the interest of the lessee is saved by 27 H. 8. c. 10. of uses which saves to all persons, and their heirs, which be or shall be seised to any use, all such former right, title, entry, interest, &c. as they might have had to their own proper use, in or to any manors, lands, &c. whereof they be or shall be seised to any use, as if that act had not been made; and therefore in such case his term being saved expressly by this act, he may enter and enjoy it, as if the feoffment to uses had been to any stranger.

Cro. Jac. *A.* leases to *B.* for years, and after the lessor by indenture enrolled and fine conveys those very lands to the lessee, and others, and their heirs, to the use of them and their heirs, to the intent that a common recovery should be had and suffered against them, with voucher of the lessor, and that he should vouch over the common vouchee, to the use of *D.* and *E.* and their heirs; all which was done accordingly; and the question was, if by all or any of these acts the term were extinct and gone? for the reversioners, who were in under the recovery, brought debt against *B.* the lessee for rent. And on *nihil debet* pleaded, and all the said special matter found, it was adjudged, that the term still had continuance, and was not merged; for although it was merged and extinct by the union of estates till the recovery came, yet when that was suffered, the uses thereof were guided by the bargain and sale enrolled, and then it is all one as if it had been no conveyance or assurance to such uses *ab initio*, and is within the equity and intent of the saving of the 27 H. 8. c. 10. and is like a feoffment to uses, and the term and rent are revived; for the intent of the statute was not to hurt those who had estates, but to preserve them. And it was agreed *per totam cur.* that if a fine or feoffment had been made or levied to the lessee for years, that the term would not have been extinguished, but should be preserved by 27 H. 8. c. 10. The objection against all this was, that the bargain and sale

sale and fine were to his own use, otherwise he could not have been tenant to the *præcipe* for suffering the common recovery, and therefore, being to his own use, there was nothing to be saved within that statute. But it was answered and resolved, for the former reasons, that his own term was saved within the equity and intent of the statute.

One seised of lands in fee makes a lease to *B.* of ninety-nine years, to such uses as he should by his last will direct: afterwards he makes his will in writing, (having then no issue by his wife, but who however was *privement enseint*,) and thereby devises these lands to the heirs of his body on the body of his wife begotten, and for want of such issue, to *B.* and his heirs, and dies; and about a month after a son was born, who by virtue of this devise enjoys the land, and after his full age suffers a common recovery, and then devises the lands to the plaintiff, and dies: the plaintiff brought this bill against *B.* to have this lease of ninety-nine years assigned to him. For the defendant it was objected, 1. That an estate in fee being by the will limited to *B.*, who was also lessee for ninety-nine years, the term was thereby drowned. 2. That this was in nature of a devise to an infant *in ventre sa mere*, which, as was objected, is not good, if there be none born at the time when the devise should take place. Notwithstanding these objections, it was decreed, that the defendant should assign the term to the plaintiff; for that such devise to an infant *in ventre sa mere* is good as an executory devise, and though the lands descend to the heir at law in the mean time, or go to the devisee in this case, yet it is subject to be defeated by the coming *in esse* of the infant, and the term for years in the mean time was only suspended, and, by consequence, must revive in the lessee when the accession of the inheritance, which occasioned that suspension, is defeated: and the term being created subject to the uses of the will, must follow the devise of the inheritance, as a trust to be disposed of as the *cestui que trust* shall direct.

If one make a feoffment in fee to the use of himself for years, without limiting any other estate, the use shall not result to him in fee, because that would merge the term, against the express declaration and manifest intent of the parties; and therefore, in such case, the reversion in fee must continue and settle in the feoffee.

In ejectment the case was thus: *Cook* let to *Fountain* for ninety-nine years, and two years after by lease and release *Cook* conveyed the inheritance to *Fountain* and another, to the use of *Cook* and the heirs of his body, with divers remainders over; and if by this conveyance the lease for ninety-nine years was merged and destroyed in all, or in part, was the question? First, it was agreed, that if such conveyance to uses had been by fine or feoffment, it would not have been destroyed, but would have been preserved by the saving in 27 *H. 8. c. 10.* So likewise they agreed, that if there had been no lease for a year, but the release had been immediate to the lease for ninety-nine years to such uses, in this case also the lease for ninety-nine years had been preserved by force of that statute;

2 Mod. 8, 9.
Nurse and
Yearworth.

Dy. 117. b.
in margin.
per Popham
and Ader-
son.

2 Lev. 126.
Mod. 107.
3 Keb. 283.
309. Cook
v. Fountain.
Freem. 384.
302. S. C.
Wigston v.
Garrett,
Freem. 411.

statute : but here being a lease for a year precedent, it was argued, that this was to the use of the lessee, and then, by acceptance thereof, he admitted the lessor's power to make such lease, and by consequence, this was a surrender of the lease for ninety-nine years, before the release to the other uses came to take place, and then the release after cannot revive it. And it was said, though this be all one conveyance, yet it differs from a feoffment ; for it will not purge a disseisin, nor make a discontinuance ; and if before the release the lessee grants a rent-charge, acknowledges a statute, confesses a judgment, or makes a lease for half a year, and then a release is made to him and his heirs to such uses ; yet it was said, that he who hath the inheritance would have no remedy to avoid these charges, but in Chancery. On the other side it was argued, that this was no merger of the ninety-nine years lease ; or if it were, yet for no more than a moiety ; for the reason of merger and extinguishment is not, as hath been argued, the party's admittance of the lessor's power to make a lease, but the merger is effected by the accession of the immediate reversion to the particular estate ; and therefore a new lease by the lessor to his lessee is not a merger or surrender of the first term, if there be any interposing or intermediate term ; and yet, in that case, the lessee admits the lessor's power to make the lease presently, as much as in the other : then, if the union and accession of the two estates be the cause of the merger, the *quantum* of the thing granted will be the measure of that merger, and by consequence, the first lease here shall be extinguished but for a moiety of the lands. But *2dly*, it was argued, That it was not extinguished for any part ; for the term is saved within the letter, or at least within the equity of 27 H. 8. c. 10. for the intent of the saving therein was to preserve the balance between the *cestui que use* and his feoffees, according to the rule of equity by which they were governed before. Now suppose that *Fountain* had a lease for ninety-nine years before this statute, and that *Cook* had desired him to accept a feoffment to his use, without doubt, the Chancery would not have compelled him to assign till the ninety-nine years expired ; and the same right seems now to be preserved by the saving, and the words are general, *all that shall be seised to any use*, not all that shall be seised by feoffment or fine ; so that *the seisin to use* is the only thing the statute regarded, and *not by what sort of conveyance* : and lease and release are now a common conveyance ; and the lease being expressly said to be to enable him to accept a release to other uses, shall not be construed to any other intent, or to be to his own use, otherwise than to enable him to accept such release ; and then if it should be admitted that the lease for ninety-nine years were extinguished by the lease for a year, yet by the release it is revived ; for being but one conveyance, it is within the equity of the statute : and *Cro. Jac.* 643. is a stronger case and yet resolved there, that though the bargain and sale had destroyed the term for a time, yet by the recovery it was revived, because then but one conveyance *ab initio* ; so here. To all this it was replied, That the very reason of merger was the admittance of

of the lessor's power to demise, and then the whole is surrendered, because he admits the lessor to have power to demise the whole, though he had but a moiety, to himself; and that where there is an intermediate estate, no merger shall be, does not make against it, for the intermediate estate disproves his admittance, that the lessor hath such power; but here is no such intermediate estate or impediment, and being joint-tenants *per my & per tout*, by the lease, the whole is merged by admittance of the lessor's power to demise the whole, though they agreed that a merger may be of one's part of an estate or term, and not for another's part. *Hale* cited a case, 6 Car. 1. *Hele Sevam*, where *A.* mortgaged lands to *B.* for years, *B.* re-demises to *A.* upon condition, if he does not pay such a sum, that he shall re-enter; and in the first conveyance were covenants for farther assurance by *A.* Then *B.* desires him to levy a fine, which *A.* does accordingly; and there it was agreed, that the term re-demised was extinguished: but if it had been expressed to what intent the fine was, it was agreed, there would have been no extinguishment of the term: and in this case, the lease is found to be *ex intentione* to enable him to take a release. However, no judgment appears to be given; but it seems reasonable that the lease for ninety-nine years, in this case, should not be merged; or at least but for a moiety; and even in that case, equity would set up the moiety or the whole term again.

If tenant *pur auter vie* makes a lease for years, and dies, living *cestui que vie*, by this the lessee for years is become occupant, and then this accession of the freehold merges his estate for years, because they cannot consist together in one person: but if, in that case, the lessee for years had made a lease at will, and then the tenant *pur auter vie* had died, (which was the principal case) it was adjudged that the tenant at will was the occupant, and by consequence, the lease for years, which was in another person, not drowned or merged, there being no union of the term for years, and the freehold in one person; and then the lessee for years may, by determination of his will, enter and enjoy his term, and the occupant cannot prevent or hinder him, because he claims in *quasi* by the first lessor, who had made such lease for years, to which the estate for life, during the life of the *cestui que vie*, was subject and liable.

If tenant *pur auter vie* make a lease for years, to *A.*, remainder to *B.* for years, and *A.* enter, and then the tenant *pur auter vie* die, here *A.* the tenant for years, shall be occupant, by reason of the possession he had in him when the life fell; and yet his term for years is not drowned, by reason of the intermediate remainder to *B.* for years; for this estate by occupancy is in the nature of a reversion expectant upon both the terms for years, as it was in the tenant *pur auter vie* himself after these leases made. And, in some cases, a term for years and a freehold may consist together in one person; as if lessee for twenty years makes a lease to his lessor for five years, this term for five years is not drowned in the freehold or fee of the lessor, by reason of the intermediate reversion for fifteen years in the first lessee.

2 Bulf. 12.
Chamberlain v.
Ewer.

Bro. tit.
Surrender,
52.
2 Bulf. 12.
Bro. tit.
Leases, 63.

Cro. Jac.
619.
Salmon v.
Swann.

The case, in effect, was this; *A.* seized in fee, grants an *interesse termini* to *B.* for one hundred years, to begin at such a time, and before that time makes a lease for twenty-one years to *C.* to begin in possession presently; then *B.* before the commencement of his term, grants it to *A.*, who after grants a rent-charge, and the grantee of the rent-charge distrains *C.* for it; and the only question was, whether the *interesse termini* were drowned in the inheritance, or if it had any existence in *A.* so that he might there-out grant the rent? for then it would avoid the second lease for years, being before it, and, by consequence, be liable to the payment of the rent. It was resolved, that it was drowned in the inheritance; for, notwithstanding the second lease for years, the *interesse termini* is not so severed from the reversion, but that by grant thereof to him who hath the inheritance, such future term or interest is drowned, and shall never rise again; and, by consequence, this rent shall not charge the possession of the termor, who had the estate before the rent granted, and comes paramount it; for though there was a severance of possession by the second lease, yet the *interesse termini* being granted before that lease, and to continue for a longer time, that second lease was subject to be defeated by the *interesse termini* when it took effect; and therefore the *interesse termini* was *quasi* immediate to the freehold and inheritance, and therefore might drown in it.

Co. Lit. 339.
Plowd. 418.
Bracebridge
v. Cook.

[1 Term
Rep. 401.]

My Lord Coke lays it down for a general rule, that one cannot have a term for years in his own right, and a freehold *in auter droit*, but that his own term shall drown in the freehold; and puts these cases: if a man, lessee for years, intermarries with the feme lessor, this shall merge and drown his own term for years; but if a feme lessee for years intermarries with the lessor, her term is not thereby drowned, because, says he, one may have a term for years *in auter droit*, and a freehold in his own right, as the husband in this case shall have: so, if lessee for years make the lessor his executor, the term is not thereby drowned, because the lessor hath a term *in auter droit*. So also, if a master of an hospital, being a sole corporation, by the consent of his brethren, makes a lease for years of the possession of the hospital, and afterwards the lessee for years is made master, the term is drowned *causa qua supra*; but if it had been a corporation aggregate, the making of the lessee master had not extinguished the term, no more than if the lessee had been made one of the brethren: but if a lessee for years of the glebe be made parson, the term is merged, by reason of the union of the term and freehold in him to his own right and use, though he has them in several capacities.

Plow. 419,
420.
3 Leon. 111.

Cro. Jac.
275.
Bulf. 118.
Plott v.
Sleep.

But this rule seems to admit of divers exceptions; for where the husband, possessed of a term for years, took wife, and after the inheritance descends or comes to the wife, the term for years or the husband is not thereby drowned or merged, because the descent was an act of law, which the husband could not prevent, and therefore shall not turn to his prejudice; but he shall have the inheritance in right of his wife, and the term for years in his own right, as he had before, and therefore may give away or dispose of the

the term as he thinks fit, notwithstanding such descent of the inheritance to his wife; and this was the opinion of *Fenner*, *Croke*, and *Fleming*, Chief Justice, and so given in direction to a jury in a trial at bar; and upon a general verdict to that purpose, they gave judgment accordingly. And *Croke* seemed to make a question, if the husband, in this case, had issue by his wife after the inheritance descended to her, so as thereby he was entitled to be tenant by the curtesy, and to have a freehold in his own right, if this should merge the term till the wife's death; and yet he said this was a much stronger case. But *Williams totis viribus* against the judgment, and held the term clearly extinct: but, notwithstanding judgment was given *ut supra*; and in this case all the court agreed, that if the lease had been made upon trust, for the advancement of such a woman, and the lessee had after intermarried with that woman, and then the inheritance had descended to her, that this would not merge the term, but that he might clearly dispose thereof to the purpose intended; because he had it *in auter droit*, and to another use. So, in another book it seems to be agreed, that if a man, being possessed of a term for years in right of his wife, purchases the inheritance, that by this the term for years, though in right of his wife, is merged and extinct, because the purchase was the express act of the husband, and therefore amounts in law to a disposition of the term, by reason of the merger consequent thereupon; but a bare intermarriage of the feme termor with the reversioner will not work a merger of the term, because by the intermarriage the term is cast upon the husband by act of law, without any concurrence or immediate act done by him to obtain the same; and therefore, in such case, the law will preserve the term in the same plight as it gave it to the husband, till he by some express act destroys or gives it away.

Godb. 2.

But where the husband himself is lessee for life, and intermarries with the lessor, this merges his own term, because he thereby draws to himself the immediate reversion, in nature of a purchase by his own voluntary act, and so undermines his own term; whereas in the other case, the term being existing in the feme till the intermarriage, is not thereby so drawn out of her, or annexed to the freehold, as to merge therein; because that attraction, which is only by act of law consequent upon the marriage, would, by merging the term, do wrong to a feme covert, and so take the term out of her, though the husband did no express act to that purpose, which the law will not allow. But in such case, if the feme should survive, and have dower of those lands, this seems a merger of her term for a third part at least, because now she hath the term and freehold both in her own right, and then the accession of the freehold must *pro tanto* merge and drown the term.

Co. Lit. 338. b.
Plow. 418. b.

So also, in case where the lessee for years makes the lessor executor, the term is not merged, because cast upon him without any act or concurrence of his, as a consequence of his being made executor; and therefore the act of law, which cast it upon him, shall preserve it in the same manner as if he had been a stranger, without any

Co. Lit. 338. Plow. 418. b. 420. a. Freem. 289. S. P.

any regard to the immediate freehold he had in his own right, which was only accidental.

Moor, pl.
157.

But if a feme executrix takes husband, and the husband after purchases the reversion, and dies, yet the feme surviving shall not have the term to any other purpose but as assets to pay debts; for as to any right of her own therein, the term is extinct by such purchase of the husband, because that was his own express voluntary act, and therefore amounts to a disposition of the term by the merger wrought thereupon; and so it was held by all the justices.

Bro. tit.
Leases, 63.
tit. Surrender, 52.
3 Leon. 111,
112. Plow.
419. b.
420. a.
Freem. 289.
S. P.

So, if one who hath a lease for years as executor purchase the inheritance, this merges the term, because the purchase was his own express act; nay, Baron *Clerk* held, that though the inheritance in such case had descended on the executor, that this likewise would merge the term, which how far it is law, may be a question; but as well in the case of the purchase, as of the descent, all agree that the term would not be extinct as to creditors, much less in case where the lessor is only made executor of the lessee for years; though *Plowden* seems to insinuate, that even in that case, the term is suspended during the life of the lessor; for he says, that after his death the term shall be revived.

3 Leon. 157,
158.
Bro. tit.
Leases, 58.

Land was given to the husband and wife, and to the heirs of the husband; the husband makes a lease for years, and dies, the wife enters and intermarries with the lessee; and it was holden that his term was not extinct, because the entry of the wife put a total interruption to the interest of the lessee, and avoided the term entirely as to herself, because she was in of the freehold by survivorship paramount the lease; and then the lease cannot take place again, till after her death, against the heirs of the husband, and whether she will outlive the term or not is uncertain; so that during her life, the lessee had no interest, but only a bare possibility, which cannot be touched or hurt by the intermarriage, but continues just as it was before.

Sanders v.
Bournford,
Fin. Rep.
424.

[A lessee for 1000 years assigned the term to the lessor in trust for his wife and children, and the lessor accepted the trust, and declared the purposes of it. The Court of Chancery supported the trust, notwithstanding the merger of the term in the inheritance, and decreed the heir of the lessor to make a further assurance of the remainder of the term to a purchaser from the son of the lessee.

Donisthrope
v. Porter,
Ambl. 600.
(a) *Ibid.*
Chester v.
Willes,
id. 246.
(b) Though
the owner
were a lunatick,
yet as between
him and
absolute real
and personal
representa-

A court of law cannot merge estates unless it finds them in the same person, and acquired, subject to some exceptions, in the same right. But courts of equity look into the beneficial interests and views of parties, and do not regard whether the estates are strictly in the same person, or in different persons. Hence it is a general rule (a) with these courts, that where the owner of an estate becomes entitled to a charge upon it (b) secured by a term of years, such term shall sink for the benefit of the heir. But exceptions to this rule are admitted in several instances; as, where the person entitled to the charge takes only an estate tail (c) in the estate, and not the fee simple. So, where by reason of a limitation (d) to trustees to preserve contingent remainders, the owner does not take the

the fee. So, where the owner of the fee (*e*) has manifested his intention, that the charge should still subsist. So, in favour of creditors, (*f*) and of infants. The cases of infants turn upon a supposed intent; and the courts sink or preserve the term, as they find to be most beneficial for the interests of the infant.

Compton v. Oxenden, 2 Vez. jun. 261. (*c*) Duke of Chandois v. Talbot, 2 P. Wms. 601. (*d*) Wyndham v. Earl of Egremont, Ambl. 753. (*e*) Powell v. Morgan, 2 Vern. 90. Thomas v. Kemish, 2 Vern. 354. 2 Freem. 207. (*f*) Ambl. 602. 2 Vez. jun. 264.

tives, the term shall merge, for as between these no equity can exist. Lord

Analogous to the case of merger at law, where the term and the fee come into the same hands, is the doctrine of courts of equity, that, whenever a man is owner of the inheritance, and entitled to a trust term of the same estate, the term shall be attendant upon the inheritance.]

Best v. Stamford, Pr. Ch. 252. 1 Salk. 154. 2 Freem. 238.

(S) Of Surrenders of Leases for Years: And herein,

1. Of Surrenders in Fact or Express: And herein again,

1. By what Words such Surrender may be made.

IT will not be here necessary to enter into a particular inquiry concerning the nature of a surrender, or of the several words whereby a surrender may be made, it being sufficient to say in general, that a surrender is a yielding up of an estate for life, or years, to him who hath the immediate estate in reversion or remainder, wherein the estate for life, or years, may drown by mutual agreement.

So that any form of words, whereby such an intent and agreement of the parties may appear, will be sufficient to work a surrender; and the law will direct the operation and construction of the words accordingly, without the precise or formal mention of the word *surrender* in the conveyance. But then the party, who would have the benefit of such conveyance to work as a surrender, must plead it by the very words *sursum reddidit*, because these only can properly describe the operation of the conveyance as a surrender; and whoever would take advantage of a thing in pleading, must determine it to that particular species of operation whereof he would so have the advantage: therefore, if lessee for life or years, say to the lessor that his will is, that the lessor shall enter into his lands, and shall have the same, or is content that the lessor shall have again the land, and by virtue thereof the lessor enters into the land, this is a sufficient surrender: so, if the lessee say to him in the reversion or remainder, that he will occupy the lands no longer, or that I surrender to you such lands, &c. and he in the reversion or remainder thereupon enter into the land, these were sufficient and effectual surrenders at the common law: but if such words had been spoken privately by the lessee, or by a stranger, and not by way of address to him in reversion or remainder, this

Co. Lit. 357. b. 2 Vent. 206. 3 Mod. 298. Perk. § 584.

Perk. § 607, 608. Cro. Eliz. 156. 488. Leon. 179. 280. 2 Leon. 50. Roll. Abr. 497. 2 Vent. 206. 3 Mod. 301.

could not amount to a surrender, because there could appear no mutual agreement of the parties for that purpose.

Dyer, 251.

Pl. 91. 93.

Cro. Eliz.

2. Cro.

Jac. 169.

Lev. 144.

Keib. 807.

[But a release of the lessee for life or years to the lessor does not amount to a surrender, for the words are repugnant; for the lessee is in possession, and the release supposes the lessor in possession. Jenk. 195. Ca. 2.] 3 Mod. 301. 2 Vent. 206. Show. Par. Ca. 150. 3 Lev. 284. Thompson v. Leach.

So, if lessee for years remise, release, discharge, and for ever quit-claim to his lessor all his right, title and estate in or to such lands; this has been held to amount to a surrender, because a lease for years consisting only in contract, these words are sufficient to dissolve that contract, and let in the reversioner. But such words, in case of a lease for life, would not amount to a surrender, because that being an estate created by livery, must be defeated by act of equal notoriety, or express words of conveyance of the freehold, which the before-mentioned words are not, but rather applicable to a thing which lies only in grant. But of that *quære*; for it hath been adjudged, that if tenant for life grant, surrender and release to him in the reversion, that this was sufficient, and so would have been, though there had not been the word *surrender*, because the word *grant* would operate as a surrender after the conveyance executed; and that such surrender, though without notice or express agreement of the surrenderee, would be good till actual disagreement thereto.

Smith v.

Mapple-

back,

1 Term

Rep. 441.

[So, where a lease came into the hands of the original lessor, by an agreement entered into between him and the assignee of the lessee, "that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent annually towards the good-will already paid by such assignee," it was adjudged, that this agreement operated as a surrender of the whole term.]

[(a) This note in writing, it hath been adjudged, need not be stamped: Farmer v. Rogers, 2 Will. 26. Beck v. Phillips, 5 Burr. 2827. However, a stamp seems now to be rendered necessary by stat. 23 Geo. 3. c. 58.]

But now by the statute of frauds and perjuries it is provided, that no leases, estates or interests, either of freehold or terms for years, shall be surrendered, unless it be by deed, or note in writing (a), signed by the party who makes such surrender, or some other lawfully authorised thereunto, or by an act and operation of law: so that surrenders in law, or implied surrenders, remain as they did at common law, if the lease, which is to draw on such surrender, be in writing pursuant to that statute.

Magennis v. Mac-Culloch, Gilb. Eq. Rep. 236.

[Since this statute, saith our author in another place, a lease for years cannot be surrendered by cancelling the indenture, without writing, because the intent of the statute was, to take away the manner they formerly had of transferring interests in lands by signs, symbols, and words only; and therefore, as a livery and seisin on a parol feoffment was a sign of passing the freehold before the statute, but is now taken away by the statute, so, he takes it, the cancelling of a lease was the sign of a surrender before the statute, but is now taken away, unless there be a writing under the hand of the party; and the words, viz. *by act and operation of law*, are to be construed a surrender in law, by the taking of a new lease, which,

which, being in writing, is of equal notoriety with a surrender in writing.

Although the statute directs that the deed or note in writing shall be signed by the surrenderor, yet where an agreement was entered into between the lessor and lessee, at the instance of the former, for the surrender of a lease, an assignment actually prepared, the key delivered up and accepted, and a long acquiescence on the part of the lessor, without any claim or demand upon the lessee, it was decreed in equity that the lessee should be discharged of the rent from the time he had delivered up the key.]

Natchbols
v. Porter,
2 Vern. 112.

2. Upon what Estate such Surrender may operate.

It appears by the definition before given of a surrender, that the same is a yielding up of an estate for life, or years, to him in the immediate reversion or remainder: but here a question may arise, what estate in the reversion or remainder will be susceptible of such surrender; for if the estate in reversion or remainder be but for years, it seems a great doubt in the books, whether a lease for years in possession may be surrendered, so as to merge and drown therein; and it is commonly said, that years cannot drown in years; therefore, where lessee for twenty years made a lease for ten years, and the lessee for ten years surrendered to his lessor, this has been held to be no surrender, so as to merge the ten years in possession, but only to transfer them by way of assignment or accession to the number of years then left in the lessor; for that years could not drown in years. But the contrary to this has been held with some clearness, and it seems to be now settled, that such surrender is good, and shall merge the first term; wherein it was agreed, 1. That if the term in reversion were greater than the term in possession, that the greater would merge the less, as ten years may be surrendered and merge in twelve or fourteen years. 2. It was held by *Garvey*, *Fenner*, and *Popham*, that though the reversion were for a less number of years, yet the surrender would be good, and the first term drowned; as if one were lessee for twenty years, and the reversion expectant thereupon were granted to one for a year, who granted it over to the lessee for twenty years, that this would work a surrender of the twenty years term, as if he had taken a new lease for a year of his lessor; for the reversionary interest, coming to the possession drowns it, and the number of years is not material; for as he may surrender to him who hath the reversion in fee, so he may to him who hath the reversion for any less term: and therefore *Popham* held, that where lessee for twenty years makes a lease for ten years, and the lessee for ten years surrenders to his lessor, viz. the lessee for twenty years, that this is good, and the lessor shall have so many of the years as were then to come of his former term of twenty years, that is, as it seems, so many years as were to come of his reversion shall now be changed into possession: and he held further, that if such lessee for twenty years had made such lease for ten years, and then granted over the reversion

Cro. Eliz.
173.
Leon. 303.
Owen, 97.
Perry v.
Allen,
Leon, 323.

Poph. 30.
Co. Lit.
218. b.
Cro. Eliz.
302.
2 Vent. 326.

for ten years only, viz. no longer than the lease for ten years was to continue, and such lessee for ten years had attained, then the grantee of the reversion should have the rent and services, and the grantor the residue of the twenty years; and that the lessee for ten years might surrender to the grantee of the reversion for ten years, and he thereby would have in possession so many years, as were then to come of his reversion; and if he had a less term in the reversion than the lessee himself had in the possession, it should go to the benefit of the first termor for twenty years, who was his grantor; for the term in possession is quite gone and drowned in the reversion, to the benefit of those who have the reversion thereupon, having regard to their estate in the reversion, and not otherwise: to all which *Fenner* agreed; and it appears by the case of *Cook* and *Fountain supra*, to be taken for clear law, that a lease for ninety-nine years might be drowned by his acceptance of a lease from the reversioner even for one year.

Co. Lit.
173. b.

But now, whether a lease for years in possession may be surrendered, so as to be merged in a lease in remainder, be the term in remainder greater or less than the term in possession, seems to be no where settled: indeed my Lord *Coke* says, that if there be a lease to *A.* for twenty years, remainder to *B.* for ten years, and *B.* release all his right to *A.*, that here *A.* hath an estate for thirty years, for one chattel cannot drown in another, and years cannot be consumed in years; but whether if *A.* had granted and surrendered his estate and term to *B.*, it would have been merged, does not appear; and *Perkins* holds, that if a lease for life be of lands, the remainder to a stranger for years, and the lessee for life surrender his estate to him in the remainder for years, it cannot take effect as a surrender, because an estate for life cannot drown in an estate for years; which reason seems to prove, that an estate for life cannot be surrendered to or merge in a reversion, if it be only for years: *ideo quare*.

Perk. § 589.

3. Of Surrenders in Law, or implied Surrenders: And herein,

1. With regard to Leases in Possession.

Bro. tit.
Leases, 14.
Dyer, 93.
pl. 28.
Perk. § 617.
3 Leon. 244.
5 Co. 11.
Cro. Eliz.
521. 605.
2 Roll.
Abr. 495.

As to the surrender in law of leases in possession, this is wrought by acceptance of a new lease from the reversioner, either to begin presently, or at any distance of time, during the continuance of the first lease; and the reason such acceptance of a new lease amounts to a determination and surrender of the first is, because otherwise the lessee would not have the full advantage he hath contracted for by acceptance of the second lease, if the first should stand in the way, and consume any of those years comprised in the second lease; for which reason, and to enable the lessor to perfect and make good his second contract, the lessee must be supposed to waive and relinquish all benefit of the first: therefore, if lessee for thirty years takes a new lease, though but for three years, and to begin ten years hence, yet this is presently a surrender and a determination

termination of the whole first term of thirty years, because thereby he admits the lessor's power to make such lease, which, if the first should stand in the way, would be void, because the lessee had the lands already for a term of a much larger duration; and though such second lease be made to him *in futuro*, and at common law, though it were even by parol, yet it would be a present surrender of the first lease, because the admittance of the lessor's power to make such a lease, which is the cause of the surrender, is then at the time of the contract made for such second lease, and therefore the operation of it, to cause a surrender of the first, must be then presently too, or not at all; and it cannot be a surrender of the last twenty years, and remain good for the first ten years, because that would make a fraction and severance of the lease, which at first was entire, and passed by one entire contract, and therefore cannot either by any surrender in law, or even by any express surrender, be curtailed and divided; the consequence of which is, that such acceptance of a new lease being a present surrender of the first, the lessor may enter and take the profits for the whole thirty years, saving only the three years comprised in the second lease. Another reason perhaps of such surrender may be, because the lessor, having already made a lease for thirty years, cannot, during the continuance of that term, make any other lease to transfer the possession; but yet having the reversion expectant upon that term, he may transfer that for any less term, or to begin at any distance he thinks fit; and then if the second lease be by deed, it may as well be supposed to carry the reversion, the union whereof, with the possession, though for never so short a time, will, as has already appeared, merge the possession; and though the second lease, which may be supposed to carry the reversionary interest, is not to commence till ten years hence, yet the first lessee has the interest and right thereof in him immediately, and then possession and reversion being inconsistent in one person at one and the same time, the one must merge and drown the other.

A husband, seized of lands, made a lease for ninety years by indenture, and after enfeoffed certain persons, and took an estate to him and his wife in tail, and after the termor took a new lease by parol of the husband for eighteen years only, to begin presently; then the husband died, and his wife evicted the termor; and it was held she lawfully might, for the first lease was surrendered and drowned in law by the acceptance of the second, and then the wife's estate, by survivorship, came in paramount the second lease; and though the second lease, which was the cause of the surrender of the first, was voidable by the wife after her husband's death, yet the surrender of the first, wrought by the acceptance thereof, was absolute and present.

One let lands to *A.* for life and twenty years over, and after let the same lands to *B.* for forty years, to commence after the death of *A.* and the end of the said twenty years; then *B.* intermarries with *A.*, and *A.* dies, and *B.* the husband hath the term for twenty years, yet his term of forty years is not surrendered by it,

Dyer, 140.
2 Roll.
Abr. 495.

Bendl. pl.
59.
And. 32.

because that was not begun, but was a future *interesse termini*, to begin wholly after the first lease ended; so there was no union at all of the terms.

3 Bulf. 203. If lessee for years makes a lease to his lessor for all but a day,
4. Roll. this is clearly no surrender of his lease, because the day disjoins
Rep. 387. the union and prevents the merger, which would have followed if
2 Roll. Abr. the lease had been for the whole term; for then the lessor would
497, 498. have had the whole estate entire in him, as he had before he made
2 Mod. 176. the lease, and consequently the lease would be merged and
drowned in the reversion.

4 Leon. 30. Lessee for twenty-one years took a lease of the same lands for
forty years, to begin immediately after the death of J. S.: it was
held in this case, that this was not any present surrender of the
first term, because J. S. might wholly outlive that term, and then
there would be no union to work a surrender; and it being in *equi-*
librio in the mean time, whether he will survive it or not, the first
term shall not be hurt till that contingency happens, for if J. S. die
within the first term, then what remains of it is surrendered and
gone by the taking place of the second.

A man makes a lease for one hundred years, the lessee makes a
lease for twenty years, rendering rent, with clause of re-entry,
and after grants his reversion to the first lessor: he shall neither
have the rent nor re-entry, because the reversion, to which it was
annexed, is extinct and gone by way of surrender: otherwise it
would be, if one make a lease for years, rendering rent, and after
grant the reversion for life, or years, to which an attornment
is had, and after such grantee surrender; yet the grantor shall
have again the rent, because it was once a rent incident to the
reversion, which by the surrender is restored whole again as it was
before.

Flow. 107. If one makes a lease for forty years, and the lessee takes a new
Co. Lit. lease for twenty years, upon condition, that if he does not do such
218. b. an act, that the lease shall be void; and after he breaks the condi-
tion, whereby the lease is avoided, yet the surrender of the first
continues, for that was absolute by acceptance of the second, and
the condition was only annexed to the second lease. So, if the
lessor had granted the reversion to the lessee upon condition, and
after the condition were broken, yet the surrender of the term
would continue, because the condition was annexed only to the
grant of the reversion, and moved from the lessor as his terms of
the lessee's enjoyment of such grant; but the surrender, which is
wrought by acceptance of such grant, and moves from the lessee
himself, was absolute; and the diversity is, when the lessor grants
the reversion to the lessee upon condition, and when the lessee
grants or surrenders his estate to the lessor upon condition; for a
condition annexed to a surrender may revert the particular estate,
because the surrender itself is conditional.

Dyer, 140. So, if such second lease were by baron seised in right of his
pl. 43. wife, and after the baron died, and the feme avoided the second
2 Roll. lease, yet the surrender of the first, by acceptance thereof, is
Abr. 495. absolute.

Lessee

Lessee for life made a lease for years, rendering rent, and after surrenders to the lessor upon condition, then the lessee for years takes a new lease for years of the lessor, and after the lessee for life performs the condition, and evicts the lessee for years, who re-enters, and the lessee for life brings debt for the first rent reserved; and it was ruled, that it was not maintainable, for the lease out of which it was reserved is determined and gone; for though the surrender of the tenant for life, which made the lessee for years immediate tenant to the first lessor, and so enabled him to make such surrender, was conditional, yet the defeating of the estate for life, by performance of the condition, cannot defeat the estate of the lessee for years, which was absolute, and well made, and then the rent reserved thereon is gone likewise.

Cro. Eliz.
264.
Brewster and
Sir Thomas
Parrot.

If one be lessee for life or years, and take a new lease of the same lands, though such second lease be void for any defect in the making or execution of it, as if it were for life, to begin at a future day, &c. yet it is a surrender of the first lease; for the acceptance of the indenture in the contracting and agreement to have a new lease, makes a surrender of the first lease before the livery is made; and therefore though that be void, yet it cannot set up the first lease again, which was before surrendered: and such contract for a new lease is a good evidence to a jury of a surrender.

Cro. Eliz.
873.
Moor, 636.
Keb. 285.

But if such second lease were void for want of power in the lessor to make it, then, notwithstanding such admittance of the lessee, the first lease would not be surrendered: therefore, where one made a lease for forty-one years by indenture 14 Nov. 1616, to A., to commence from the *Annunciation* which should be anno 1619, and after, the same year, by another indenture bearing date 3 Dec. made a lease to B. for ninety-nine years, to commence from the *Annunciation* then last past, by virtue whereof B. entered and was possessed, and then the lessor by another indenture 16 Nov. 1617, made another lease of the same lands to A., to commence from 17 Nov. 1619, for forty-one years, who accepted thereof, and after the commencement of his term A. entered and was possessed, and made his will, and his executors let to the plaintiff, &c. and the only question was, if the acceptance of the second lease by A. had determined, discharged or extinguished the first lease, so as to let in the intermediate lease to B.? It was adjudged, that it had not, because by the lease to B. for ninety-nine years, and his entry, the lessor had but a reversion, and could not by his contract after with A. give any interest to A.; and the first lease to A. was good as a future *interesse termini*, to take effect in possession when the time came, and thereby *pro tanto* to defeat the lease for ninety-nine years to B.; and if it had not been for the lease to B., there had been no question but that the first lease to A. had been by such acceptance of the second lease surrendered and gone; but that intermediate lease, being for so great a number of years, disables him, during that time, to contract for any less number of years, as the lease for forty-one years was,

Hutton, 104.
Watt and
Maidwell.
[No sur-
render, ex-
press or im-
plied, in or-
der to, or in
considera-
tion of, a
new lease,
will bind,
if the new
lease is ab-
solutely
void; for
the cause,
ground, and
condition
of the sur-
render fails.
Per Lord
Mansfield,
Zouch v.
Parsons,
3 Burr.
1807. Lloyd
v. Gregory,
Sir W. Jen.
405-6.
Wilson v.
Sewell,
4 Burr.
1980.
Davison v.
Stanley,
Id. 2210.]

Perk. §604.

If *A.* lets to *B.* for ten years, who lets to *C.* for five years, *C.* cannot surrender to *A.* by reason of the intermediate interest of *B.*, but in such case *B.* may surrender to *A.*, and afterwards *C.* may surrender likewise, because then his lease for five years is become immediate to the reversion of *A.*

2. With regard to Leases in Futuro.

Co. Lit. 338.
5 Co. 11.
10 Co. 53.
Cro. Eliz.
522. 605.
Poph. 9.
2 Roll.
Abr. 496.

Surrenders in law of leases *in futuro*, or future interests—and these can no ways be surrendered, for an express surrender of such future lease or interest is not good, (except as after mentioned); therefore, if one makes a lease for years, to begin at *Michaelmas* next, this future interest cannot by any express surrender be merged, because there is no reversion wherein it may drown; for till the entry the lessee hath no possession, and, by consequence, there can be no reversion wherein that possession may drown: but yet if such lessee before *Michaelmas* take a new lease for years, either to begin presently, or at *Michaelmas*, this is a surrender in law of the first lease presently; because thereby he presently admits the lessor's power to make such lease, which, if the first lease should stand, he could not do; and since such lessee hath contracted for a new interest, inconsistent with the first, his acceptance of such new interest waives and dissolves the first, because the contract whereby it was made, was entire, and therefore the whole first lease is surrendered presently.

2 Roll. Abr.
494. 495.
a lease in
futuro.

Lessee for years, to begin presently, cannot till entry or waiver of the possession by the lessor merge or drown the same by any express surrender, because till entry there is no reversion wherein the possession may drown: but if the lessee had entered, and assigned his estate to another, such assignee before entry might have surrendered his estate to the lessor, because by the entry of the lessee the possession was severed and divided from the reversion, which possession, being by the assignment transferred to the assignee, may without any other entry be surrendered, and drown in the reversion.

3. With regard to the Thing itself so surrendered.

Cro. Eliz.
373.
Moor, 636.
Cro. Jac.
84. 177.
2 Roll.
Abr. 496.

As to the nature of the thing surrendered, herein we must observe, that the acceptance of a new lease, which will work a surrender of the first, ought to be of something of the same nature and kind with the first; otherwise there can be no surrender of the first, because there is no inconsistency but that both may stand together; therefore if lessee for years accepts a grant of a rent, common, estovers, herbage, or the like, for life or years, out of the same lands, or if such lessee for years accepts of a lease of the same lands at will only, all these amount to a surrender and determination of the first lease, because they admit the lessor's power to deal or contract for the lands, or a certain charge out of it, which being inconsistent with the interest of the lessee under the first lease, dissolve and destroy it.

So, where lessee for sixty years of an advowson did, after the church became void, take a presentation to himself of the lessor, and was admitted, instituted, and inducted, this was adjudged to be a surrender of his lease; for by the acceptance of the parsonage he thereby gains a new interest for life in that which was the chief fruit of his lease, and, consequently, such interest, being inconsistent with his interest under the first lease, amounts to a determination and surrender thereof.

But if lessee for years of a park accepts a grant of the office of park-keeper of the same park for life or years, this is said to have been adjudged no surrender of the lease for years, because such office is collateral to the land, and not any ways issuing out of it; and yet *Coke* and *Dodderidge* thought, that whether he had the office of park-keeper first, or the lease for years of the park itself first, that the accession of the other to it would merge and drown the first, for the inconsistency that a man should be park-keeper to himself; *ideo quare*.

So, where one made a lease for ninety-nine years of a manor, and after made the lessee bailiff of the same manor for twenty-one years, this was adjudged to be no surrender of his first lease: 1. Because the bailiff, as such, had no interest in the lands, but an authority only. 2. Because the bailiwick was no part of the thing demised, but of another nature; for the bailiff, as such, is a mere servant, and all he doth is for the benefit, and in the name of his master. So, if such lessee of a manor were made surveyor or steward for life, this would not determine his lease; because in these capacities he is only a servant, and acts in the name of his master, and therefore no inconsistency therein with his having a lease of the manor.

But where lessee for years of a house or castle accepted a grant of the custody thereof for life or years, this was adjudged a surrender thereof; because the custody is of the same thing which was leased, and a man cannot be keeper to himself.

If lessee for years of lands accepts a new lease by indenture of part of the same lands, this is a surrender for that part only, and not for the whole, because there is no inconsistency between the two leases for any more than that part only which is so doubly leased; and though a contract for years cannot be so divided or severed, as to be avoided for part of the years, and to subsist for the residue, either by act of the party, or act in law, yet the land itself may be divided or severed, and he may surrender one or two acres, either expressly or by act in law, and yet the lease for the residue stand good and untouched, because here the contract for the residue remains entire, whereas, in the other case, the contract for the whole would be divided, which the law will not allow.

Hutt. 105.
Cro. Jac. 84.

Cro. Jac.
177.
2 Roll.
Abr. 496.
Roll. Rep.
83. Godb.
419. 425.
2 Roll. Rep.
357. 361.

Cro. Jac.
84. 177.
Noy, 12.
2 Roll.
Abr. 496.

Dyer, 200.
pl. 62.
Cro. Jac.
177.
2 Roll.
Rep. 357.
2 Roll.
Abr. 478.
Fifth v.
Campion,

(T) Leases, when determined by cancelling the Deed.

Bro. tit.
Leases, 6.
16. Cro.
Car. 399.
Jon. 355.
Moor, 35.
Pl. 116.

AS to leases for years, owing their existence to the deed or indenture whereby they are created, so that the cancelling or destruction thereof shall destroy and avoid the lease, a diversity seems to be taken in the books between such things as lie in livery, and may be executed by actual entry, and such things as lie only in grant, whereof no actual or manual occupation can be had; therefore, if one had made a lease for years, at common law, of lands or houses by deed or indenture, and tear, rase, or cancel it, yet this would not destroy the continuance of the lease itself, because such lease of lands or houses lying in manurance and actual occupation might at first have been made by parol only, without any deed or indenture: and therefore such deed or indenture being not of the essence of the lease, the destruction or cancelling thereof shall not defeat or destroy the lease or interest of the lessee, because his actual entry into the land, and continuance of the visible possession and occupation thereof, gives sufficient sanction and notoriety to the contract, as to the interest of the lessee in the lands and houses themselves, though thereby the deed itself, and all covenants, which had their existence only by the deed, are defeated and avoided. But if the king made a lease of such lands or houses by letters patent, which are matter of record, if the letters patent and enrolment are destroyed or cancelled, the lease itself falls to the ground, because these letters patent and enrolment, which were of the essence of the creation and continuance of the lease, are destroyed and lost. So, if a common person had made a lease for years, or a grant for years, of tithe, common, advowsons, or other things which lay merely in grant, in such cases the cancelling or destruction of the deed, whereby they were created and subsisted, must necessarily destroy the interest of the grantee likewise, because such deed was of the very essence of the deed or grant, without which it could not have been made at first, nor can subsist afterwards, such deed being the only evidence of the contract, which could not be executed by any actual possession or manual occupation. But now, since the statute of frauds and perjuries, which makes all leases for above three years to have only the force and effect of leases at will, unless they be in writing, and signed by the party, &c. the deed or writing whereby such lease is made seems to be of the same essence as the lease itself; and therefore the cancelling or destruction of that seems to destroy and avoid the lease itself, because it destroys all evidence allowed by law for the support thereof; though in such case, Chancery frequently sets up the lease again, or decrees the party to execute a new one for the residue of the term, which is not against the prohibition of the act, because there was once a good and effectual lease made pursuant to the statute.

And though that statute excepts leases not exceeding the term of three years, yet not absolutely even those; for it goes on, "not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts at least of the full improved value of the thing demised, and that no leases, estates, or interests, either of freehold or terms for years, or any uncertain interest, not being copyhold or customary interest of, in, to, or out of any messuages, manors, lands, &c. shall be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."

29 Car. 2. c. 3.
A lease for three years to commence in futuro, by parol is void by this statute.
12 Mod. 610. Lord Raym. 736.
[But a lease by parol for less than three years to com-

mence in futuro, is good. Ryley v. Hicks, 1 Str. 651. Bull. N. P. 177. S. C.]

[(T. 2) When forfeited.

HERE it is to be observed, that any act of the lessee by which he disaffirms or impugns the title of his lessor, occasions a forfeiture of his lease. For to every lease the law tacitly annexeth a condition, that if the lessee do any thing that may affect the interest of his lessor, the lease shall be void, and the lessor may re-enter. Besides, every such act necessarily determines the relation of landlord and tenant; since to claim under another, and at the same time to controvert his title; to affect to hold under a lease, and at the same time to destroy that interest out of which the lease ariseth, would be the most palpable inconsistency.

A lessee may thus incur a forfeiture of his estate by act *in pais*, or by matter of record. By matter of record—where he sues out a writ, or resorts to a remedy, which claims or supposeth a right to the freehold; or where in an action by his lessor grounded upon the lease he resists the demand under the grant of a higher interest in the land; or where he acknowledges the fee to be in a stranger: for having thus solemnly protested against the right of his lessor, he is stopp'd by the record from claiming an interest under him. By act *in pais*, as where he alienates the estate in fee (a). But then this alienation must be by such mode of conveyance as displaces or divests the estate of the reversioner (b): for if it have not this effect, the law will not adjudge it a forfeiture. It must be, therefore, by feoffment with livery; for this only operates upon the possession, and effects a disseisin. It cannot be by a grant, or any conveyance in the nature of a grant, such as lease and release, bargain and sale, &c. conveyances of this kind operating only on the grantor's interest, and passing only what he may lawfully depart with. And as it cannot be by grant, of course no forfeiture can by this way be incurred of an estate of those things which lie merely in grant.

being in the king, make a feoffment in fee, this is a forfeiture; and yet no reversion or remainder is divested out of the king; and the reason is, in respect of the solemnity of the feoffment by livery, tending to the king's disherison. Co. Lit. 251. b.

Co. Lit. 251. a.
Hawk. Abr. Co. Lit. 339.
Dixey v. Spencer,
3 Leon. 220.
Moor, 211.
Goulds. 40.
S. C. Godb. 105. seems to be S. C.
Barkhouse's case, 4 Leon. 3. Dy. 209.
pl. 21. in marg.
2 Lev. 52.
(a) Co. Lit. 251. b.
1 Burr. 92.
Co. Lit. 251.
(b) But if tenant for years, the reversion, or remainder

And

Eastcourt v.
Weeks,
1 Salk. 187.

And if an attempt to alienate by those modes of conveyance which affect, but are not operative enough, to pass a fee, occasion no forfeiture, a lease by the tenant for a greater number of years than he has in the land must be still more venial; because it is only a contract between him and his under-lessee, which cannot possibly prejudice the interest of the original lessor, and does not even pretend to usurp or touch the freehold and inheritance.

(a) 10 Co.
129. a.
Plow. 70.
a. b.
(b) Cro.
Eliz.
Dy. 45. b.
4 Leon. 5.
3 Leon. 67.
Styl. 483.
3 Wilf. 234.
2 Bl. Rep.
767. S. C.
Doe v.
Skeggs,
Tr. 21 G. 3.
B. R. cited
in 2 Term
Rep. 423.
(c) Cruise
v. Bugby,
3 Wilf. 234.
2 Bl. Rep.
767. S. C.
But where
the words of
a proviso
were, that
the lessee,
“his execu-
tors or ad-
ministra-
tors, shall
“not set, let, or assign over the said hereby demised messuage or dwelling-house, or any part thereof,”
an under-lease by the lessor’s administratrix was holden to be within the meaning of the proviso. Roe
v. Harrison, 2 Term Rep. 425.

Forfeitures are also incurred by the breach of *express* or *conventional* conditions. For the lessor, having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they be not illegal, or repugnant to the grant itself, and upon the breach of these conditions may avoid the lease. A condition, that if the rent be behind by the space of any given time after the day prescribed for payment, the lessor shall re-enter, is good; and such condition is not saved by the attendance of the lessee with the rent merely on the first day of payment; for, if the lessor be not then there to receive it, the lessee must equally attend on the last day (a). Conditions in restraint of alienation are legal and usual; but whether such conditions extend to assignees in law, is a point which doth not yet seem to be settled (b). But the courts have always held a strict hand over these conditions for defeating leases, and have countenanced very easy modes for putting an end to them. Where, therefore, the words of the condition were (c), that the lessee, “his executors or administrators, shall not, at any time or times, “during this demise, assign, transfer, or set over, or otherwise do “or put away this present indenture of demise, or the promises “hereby demised, or any part thereof,” the court held, that this condition was not broken by an under-lease; for that *assign, transfer*, and *set over* are mere words of assignment; that *otherwise do* or *put away* signify any other mode of getting rid of the premises entirely; and cannot extend to the making of an under-lease.

3 Co. 65.
a. b.
2 Term
Rep. 431.
Co. Lit.
315. a.
Plowd. 131.
3 Co. 64. b.
Cro. Eliz.
220.
(d) In such
case, it
should seem,
the forfeit-
ure may be
taken ad-

And as the courts adhere strictly to the precise words of the condition in order to prevent a forfeiture, so, where a forfeiture hath manifestly been committed, they will not allow the lessor to take advantage of it, if they find that he has afterwards done any act which amounts to a waiver of it. Acceptance of rent hath been adjudged to be an act of this kind; but then, in order to give it this effect, it must appear, that at the time the lessor received the rent he had notice of the forfeiture: for it would be absurd, and a most unwarrantable conclusion, to infer from the mere receipt of the rent that he meant to remit a forfeiture he had never heard of. However, when we say that a forfeiture may be waived, we must be understood to confine ourselves to those cases, where by the terms of the contract, the estate, upon the tenant’s doing or failing to do what he has stipulated to do or abstain from, is only determinable, not where it absolutely determines; where the lease is only voidable, not where it is merely void (d). In the one case, the

the forfeiture is incomplete, some act of the lessor is necessary to perfect it; that is, to speak more correctly, no forfeiture is actually incurred in the instant, only a right of avoiding the lease accrues to the lessor, which right he may waive as he may any other right that is merely personal and conventional. In the other case, the contract is at an end, the lease is determined; it is a nullity; the lessee has no interest upon which the will of the lessor can attach.

vantage of even by a wrongdoer. But see *Kinnersley v. Orpe*, Dougl. 56. *contra*.

By stat 4 G. 2. c. 28. § 2. every landlord, who hath by his lease a right of re-entry, in case of non-payment of rent, when half a year's rent is due, and no sufficient distress is to be had, may, without any previous demand of the rent, or re-entry, serve a declaration in ejectment for the recovery of the demised premises; and a recovery in such ejectment shall be final and conclusive, both in law and equity, unless the rent and all costs be paid or tendered within six calendar months afterwards. But if the tenant, at any time before the trial in ejectment, pay or tender to the landlord the whole rent in arrear, with the costs, or pay such arrears and costs into court, the proceedings in ejectment shall cease, and the tenant shall be relieved in equity, and hold the lands demised according to the old lease without any new lease.

In *Archer v. Snapp*, Andr. 341. Lord C. J. Lee observes, that both the courts of law and the courts of equity had, before this statute, exercised a discretionary power of staying the lessor from proceeding

at law, in cases for forfeiture of non-payment of rent, by compelling him to take the money really due to him. See Bull. N. P. 97. and 2 Str. 900. *acc*.

(U) Of the Renewal of Leases, by whom, and for whose Benefit.

A Lease, we must have observed, is a contract, by which, in consideration of some pecuniary or other recompence, the temporary possession of lands or tenements is granted to another; for if the grantor parts with his whole interest in the estate, the contract is not a contract of lease, but of sale; it being essential to a contract of lease, that there should be a reversion left in the grantor. But a practice has prevailed, particularly in leases from the crown, from the church, and from other corporations, of granting a further term to the old tenants, in preference to strangers; and as this expectation of renewal is rarely disappointed, such tenants are considered as having an ulterior interest beyond their subsisting term. This interest is generally, but improperly, called their *tenant-right of renewal*. For it has happened in this case, as it has happened in many others, that long indulgence has been made a ground of claim; a preference repeatedly given has, in process of time, been insisted upon as a prescriptive privilege; and attempts have been made to enforce that as a right, which was, in truth, a pure voluntary curtesy. But though such attempts have failed of success, there being, as between landlord and tenant, abstractedly from any express contract to that effect, no obligation upon the former to renew with the latter, yet the almost invariable recurrency of the grant to the same objects, has

See the very learned and ingenious argument for the appellant in the case of *Lee v. Vernon*, 7 Br. P. C. 438. and see also Mr. Butler's note in his edition of Co. Lit. 293. b.

begotten an idea of something like property, and men have been so far from treating this ulterior interest as precarious, that they have acted upon it, as if it were fixed and certain. Hence, leases of this sort are become a fund for settlements of every kind, for mortgages and other securities; and are subjected to the same limitations, and applied to the same provisions with the most permanent interests.

2 Atk. 597.
2 Br. Ch.
Rep. 248. This tenant-right, as it is called, is recognized and protected by courts of equity in many instances. Hence, where a trustee, executor, or guardian, avails himself of his situation, and gets a renewal of a lease for his own benefit, the courts will direct it to be for the use of the *cestuy que trusts*, or persons beneficially interested in the old lease. So, where a person who has only a partial interest, as tenant for life, mortgagee, or mortgagor, from the circumstance of being in possession, takes the opportunity of renewing, such renewal shall be for the benefit of the person entitled to the reversion. And according to the broad principles of equity, it should seem, that wherever a grant of a reversionary term is obtained, to the prejudice of the old tenant, by undue means, whether by *suggestio falsi*, or *suppressio veri*, the party so obtaining it, though an entire stranger, shall not be permitted to hold it to his own use.

Keech v.
Sandford,
or Rumford
Marketcase,
2 Eq. Ca.
Abr. 741.
Sel. Ca. in
Chan. 61.
S. C. A lease of the profits of a market was devised to a trustee, in trust for an infant: before the expiration of the term, the trustee applied to the lessor for a renewal for the infant's benefit, which he refused, in regard that it being only the profits of a market, there could be no distress, and it must rest solely on covenant, which the infant could not bind himself in; on which the trustee got a lease to himself. It was decreed by Lord Chancery King, that the lease should be assigned to the infant; that the trustee should be indemnified from the covenants of the lease, and should account for the profits since the renewal. His lordship said, he must consider this as a trust for the infant; for if a trustee, on refusal to renew, might have a lease to himself, few trust-estates would be renewed to *cestuy que trusts*: that the trustee should rather have let it run out; than to have had the lease to himself: that it may seem hard, that the trustee is the only person of all mankind who may not have the lease; but it is very proper that the rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusing to renew to *cestuy que trusts*.

Anon.
2 Chan. Cas.
207. A lessee for years, subject to a trust, devised *residuum bonorum*: the estate, if all sold, would but pay the debts: the executor paid the debts, and renewed the lease for a further term, it being a church lease, and offered to account, if any profits should arise out of the old term. It was insisted, that by paying debts to the value, the property was altered, and vested in him in his own right. But the Lord Keeper decreed the executor to account for the new as well as the old lease; and asked, if the executor acquainted the church with his case, and declared that he would renew and take it for the time of the old term, to the benefit of the creditors

and

and executors, and the rest for himself? By the *French* law, his lordship said, no churchman can make a lease to any but the old tenant, unless it first be refused by the old tenant.

An executor in trust for an infant of a lease for 99 years, determinable on lives, renewed the estate for lives absolutely. It was holden that the renewed lease, though for lives only, should follow the nature of the original lease, and go to the personal representatives of the infant.

Whitler v.
Whitler, 3 P.
Wms. 99.

If a bishop makes a lease for 21 years, and the lessee creates a trust thereupon, and the bishop dies, and his successor for a fine renews the lease; though he were not compellable to do so, and though there be no trust of the second lease, yet equity will subject it to the former trust.

Per Serjeant
Powis, in
Canc.
6 Mod. 57.
Anon.

A. mortgaged a college lease to *B.* for 4000 *l.*, and secured the money likewise by statute to *B.*; *A.* died, and made *C.* executor. The executor renewed in his own name several times, until the original mortgage lease expired by efflux of time. It was decreed, that *B.* paying the several fines, gratuities, and charges which *C.* had expended on account of the renewal, should hold the premises until the debt were satisfied.

Luckin v.
Rushworth,
Finch's
Rep. 392.
2 Ch. Rep.
113. S. C.

One of three lessees under a dean and chapter surrenders, and gets a renewal to himself. *Per* Lord Keeper *North*, It is a trust for all.

Palmer v.
Young,
1 Vern. 277.

John Coombe, possessed of several leasehold houses holden of the crown; and having a daughter, *Joanna*, married to *Samuel Clarke*, devised unto such child or children, as his said daughter had, or should have, by *Samuel Clarke*, two of his leasehold houses, and directed, that the rents and profits should be applied for bringing them up, and educating them, and for placing them out, and setting them up, in such proportions as *Samuel Clarke* and his wife should think fit; and that they, and the survivor, should have power to divide the profits between their several children, when and in such parts as they should think fit. Part of the lease being expired, *Samuel Clarke* obtained an additional term from the crown for 25 years from the expiration of the term then in being. *Samuel Clarke* and *Joanna* his wife had two children, and on the marriage of *Coombe Clarke*, their son, to *Martha Dethie*, assigned one of the leasehold houses to trustees, for the remainder of the term then in being, and of the renewed term of 25 years, upon trust, to permit *Coombe Clarke* to receive the rents and profits for life, and then to permit *Martha* to receive the rents and profits for her life, and after her death to apply the rents and profits for the son of the marriage, for his education, and to convey the premises to him at 21. *Coombe Clarke* died, leaving *Martha* surviving, and several children, of whom *Samuel Clarke* was the eldest, who attained his age of 21, and survived his mother. *Martha*, after her husband's death, obtained an additional term of 28 years from the expiration of the existing lease, and afterwards made her will in 1748, and gave the residue of the estate in trust for her daughter *Mary Clarke*, an infant, and died in 1751. Upon her death, *Samuel Clarke* took possession of the house.

Taiter v.
Marriott,
Ambl. 683.

house. He mortgaged it to the plaintiff in 1755, and died in 1756 intestate. *Coombe Clarke*, the next son, took out administration to his brother *Samuel*. *Mary*, the daughter, having married the defendant, *Marriott*, they got the tenant to attorn, and pay the rent to them. On a bill by the plaintiff to have an assignment of the 28 years term, and to be paid his mortgage money, or foreclose, *Marriott* and his wife set up title to the renewed term, as being obtained by *Martha* for her own benefit, and derived title to themselves under her will. The question therefore being, whether the additional term was to be considered as an interest acquired by *Martha* for her own benefit, or whether it should follow the uses of the settlement? Sir *Thomas Serwell*, master of the rolls, was of opinion, that the additional term was to be considered as an engraftment upon the old term, on the principle which prevailed in the case of *Rumford Market* and other cases; and followed the uses of the settlement and deed. Lord *Camden*, upon the appeal, was of the same opinion, and decreed accordingly.

Rawe v.
Chichester,
Ambl. 715.
1 Br. Ch.
Ca. 199.
n. S. C.

Richard Rawe seised of real estate, and possessed, among other things, of a lease of lands and houses in *Suffolk*, originally granted by *Cha.* 2. in right of the duchy of *Cornwall*, for 31 years, renewable from time to time, upon petition by the tenant in possession, for a further number of years, to fill up the term of 31 years, made his will 20th *December* 1761, and reciting his being possessed of leasehold houses at *Lambeth*, and of several estates in land in *Cornwall*, for unexpired terms of years, gave and devised the said several leases to his wife, for as many years of the term as she should live, and after her decease, (if the terms should be then in being,) he devised them to *William Rawe* for life, and after his decease, among such of the children of *William Rawe* as should be then living, and made his wife executrix and residuary legatee. The testator had renewed this lease just before his death, and the widow, during her life, renewed it several times, stating herself as widow and executrix of *Richard Rawe*, and continued in possession till her death in 1761, in which year she made her will, and disposed of these leases, as her own property. The question was, whether these renewed leases were the property of *Richard Rawe*, and to go according to the limitations of his will; or were the absolute property of the widow? Lord *Bathurst* thought, she renewed as executrix, subject to the trusts, in the will of *Richard*, and that the plaintiffs had a right to the renewed leases, repaying to the widow's estate the sum she had paid for the fine, deducting the value of her chance in the renewed lease.

Owen v.
Williams,
1 Br. Ch.
Ca. 199. n.
Ambl. 734.
S. C.

William Williams devised leasehold estates to Sir *William Burnaby*, in trust to renew the same, then to his wife for life, remainder to his brother *John Williams* for life, remainder to *Bennet Williams*, son of *John*, and the heirs of his body, and made his wife executrix. Several years of the lease being to come, Lord *Grosvenor* petitioned for a lease of the reversion. Mrs. *Williams* discovering this, presented her petition as executrix, giving

giving notice of it to the remainder-man, and got a report from the surveyor-general, that she was in possession, and that the fine ought to be about 1200*l.* or 1400*l.* Lord *Grosvenor* got a warrant from the Treasury for a lease, but was to pay her a compensation for her right. *John* and *Bennet Williams* then presented petitions for renewal. Lord *Grosvenor* made several offers to Mrs. *Williams*, who communicated them to *John Williams*; but it appeared both Lord *Grosvenor* and Mrs. *Williams* conceived them to be for her own benefit. At length they settled the terms at 3000*l.* Mrs. *Williams* gave notice to *John* and *Bennet* of the probability of their agreeing, and advised them to take care of their own interests.—It was contended on the part of Mrs. *Williams*, that this 3000*l.* was absolutely her property; and that *John* and *Bennet* had no claim upon her for any part of it. But Lord *Bathurst* held, that in case she had renewed, it would have been a renewal as executrix; that wherever a partial tenant renews, it is for the benefit of the whole; and therefore that the 3000*l.* given by Lord *Grosvenor* as a recompence for her not renewing, was subject to the trusts in the will.

John Pickering, the plaintiff's father, previous to his marriage with *Ann*, the plaintiff's mother, gave a bond to trustees in the penalty of 400*l.*, conditioned to be void if he should assign to them, or to other persons to be nominated by *Ann*, a leasehold estate for the term of 99 years, or such term as he should have therein, for three lives, of which *Ann's* should be one, to the use of himself for life, remainder to *Ann* for life, remainder to the issue of the marriage. *Ann* died under coverture, leaving the plaintiff and another child. The estate was conveyed to *John*, *Ann*, and another life. In 1776 *John* died, having made his will, and thereby given to *Henry*, his issue by a second marriage, all the rest and residue of his estate. It did not appear how many renewals of the estate had taken place, or for what lives, but that *John's* being the last original life, they were all exhausted in 1776.—For the executors of the husband, and *Martha*, the second wife, it was contended, that all the original lives falling in 1776, there was no obligation on the father, or his estate, to renew, and that the expence of renewal, having been his, it should be for his benefit. On the contrary, it was argued for the plaintiff, that this bond was purely a contract for a marriage settlement, and that the usual mode of executing it would be to insert a covenant to renew to the same uses, the object of the parties being to give as large an interest to the children as to the parents. For this was cited *Lawrence v. Maggs*, before Lord *Northampton*, 26th Novem. 1759, that the usual form of the covenant being to keep the lease fully estated, the settlement must be so executed. In that case, the party had, while solvent, frequently renewed the lease, and conveyed it to the uses of the settlement; the creditors insisted, that the lease was part of his assets, and the conveyances fraudulent. But the court thought, that having conveyed according to the settlement, it was not fraudulent, but the settlement must be carried into execution. By Lord Chancellor *Thurlow*,—The ques-

Pickering
v. Vowles,
1 Br. Ch.
Rep. 197.

tion is, whether the father, having renewed, shall be considered as having so done for the benefit of the settlement, or for his own benefit? He did not, by the marriage settlement, or by any subsequent act, express any intent to do it for the benefit of the settlement, and by his will, he has given it, by sufficiently express words, to his son. If a man has estates of his own, and also pure trusts, and gives the residue by will, only his own estates will pass by the residuary clause; but if he has an interest, as well as a trust, the clause will pass both. But this is the case of a tenant-right, as it is called, which, though an improper, is become a technical term. In the West many estates derive their value from renewals. The crown also has many estates of the same nature. It has long been held, that where a trustee or an executor renews such an estate, it shall be for the use of the *cestuy que trust*. The rule has obtained with respect to a tenant for life, who has the opportunity of renewal from being in possession, that he shall not obtain the reversion for his own use. The court therefore obliged him to stand seised as a trustee to the uses of the settlement: that was determined in *Razve v. Chichester*, before Lord Bathurst. This is that case; for though *John* was author of the settlement, it was intended that the lease should be fully estated, and that he and she should have life estates, and that so fully estated, it should go to the children. The renewal therefore must be to that purpose. The son is entitled to the estate, paying the expence of the renewal.

Lee v.
Vernon,
7 Br. P. C.
432.

In 1661 a lease was granted by *Cha. 2.* under the seal of the Duchy of Lancaster, of the parks of *Hanbury* and *Tutbury* in the county of *Stafford*, to *Edward Vernon* for 31 years from *Michaelmas* in that year. In the following year another lease of these parks was granted by the king to *Sir Thomas Morgan*, to commence immediately after the expiration of the preceding lease. This lease becoming vested in *Edward Vernon*, he in 1678 obtained another reversionary term from the crown for 63 years from the expiration of the lease to *Sir T. Morgan*.

In 1687 *Edward Vernon* died, leaving issue two daughters, both of whom died without issue and unmarried. After his death the last-mentioned lease became vested in the appellant's father, who was accordingly in possession thereof until the time of his death, which happened in *Oct. 1748*. He left a widow, and the appellant, his only son, then about five years old. The widow, as executrix of her husband, and legatee of his personal estate, entered upon the premises comprised in the lease, and held them until her death in 1763. By her will she gave the appellant, her son, all the rest and residue of her personal estate, to be delivered up to him at his age of 21 years, or marriage; and under that bequest, he enjoyed the leasehold premises. These premises lying contiguous to the lands and castle of *Tutbury*, held by the respondent by lease from the crown, under the Duchy seal, he, in the year 1755, applied to Lord *Edgewcombe*, then Chancellor of the Duchy of *Lancaster*, and represented to him, that he (the respondent) was the heir-male of the said *Edward Vernon*, and in possession of the

family seat by inheritance from *Henry Vernon*, his great-grandfather, and that the said leasehold estates had been disposed of out of the family by the said *Edward Vernon*, or his representatives, and were very desirable to be enjoyed with the respondent's said seat; and therefore he requested of Lord *Edgecumbe*, as a matter of favour, that a reversionary lease of the said parks might be granted to him, to commence on the expiration of the lease then subsisting. With this request Lord *Edgecumbe* complied; and accordingly a lease of these premises was granted on 12th of *May* 1755 to the respondent for nine years and a half to commence in *Mich.* 1776, when the term of 63 years, granted by the lease of 1678, would expire: and for this lease the respondent paid a fine of 200*l.* In the year 1765, the respondent presented a petition to Lord *Strange*, then Chancellor of the Duchy of *Lancaster*, praying a grant to him of the said parks and premises for such further term, as, together with the terms then subsisting, would make up 21 years. And in the years 1766 and 1768, two petitions were presented by the appellant to Lord *Strange*, praying, that a lease might be granted to him of the said parks for ten years and a half, to commence from the 5th of *April* 1786, when the lease now in question would expire, or for such other term as to his lordship should seem meet. In pursuance of an order made by Lord *Strange*, the matter of these petitions, on the part both of the appellant and respondent, came on to be heard before his lordship, in the presence of counsel for the parties, on the 8th of *April* 1768, when his lordship declared, that the tenant-right or lord's favour of renewal of the lease was in the appellant; and dismissed the respondent's petition, but suspended for the present all proceedings upon the matter of the appellant's petition, so far as the same respected the new leases prayed.—In *Hilary* term 1773, the appellant filed a bill against the respondent in the Exchequer, by which he prayed, that the respondent might be declared a trustee for him, as to the lease granted in 1755, and might be decreed to assign the same to the appellant for his own use and benefit; the appellant thereby offering to pay the respondent the fine of 200*l.* and all reasonable expences incurred in obtaining that lease, together with interest for the same from the respective times of payment. And as a ground for such relief, the bill charged, that when the said lease was obtained, the appellant was an infant of seven years of age; that the respondent had presented the petition, upon which that lease was granted, without the privity of the appellant's mother, in whom the possession of the premises then was; that no mention was made in that petition, as usual in such cases, of any term or interest subsisting in another person, nor any notice given to the appellant's mother of the application for such lease, but, on the contrary, the whole transaction was industriously concealed from her; and that the petition for obtaining such lease had unduly stated, that the respondent would have been entitled to the premises, if *Edward Vernon* had not disposed thereof; but the appellant charged, that the respondent was not of kindred to *Edward Vernon*. To this bill

bill the respondent filed a demurrer; on the argument of which, two of the barons were of opinion, that the demurrer should be allowed, and the other two were against the allowance of it, thinking, that the appellant ought to have the satisfaction of an answer to the bill, especially to such part thereof as sought a discovery of facts. Upon this the respondent put in an answer, in which he admitted, that when the lease was granted to him, the appellant was an infant; and that he did not give notice to the appellant's mother, when he applied to Lord *Edgecumbe* for a grant of the lease; but he denied that he had industriously concealed the transaction from her, and insisted, that he was not in any respect bound to disclose it to her, or to inform Lord *Edgecumbe* that she had at that time any interest in the premises; for that he had been informed, and believed, that until Lord *Strange* became Chancellor of the Duchy, no certain rules had ever obtained with respect to granting leases of Duchy lands; but that the Chancellor of the Duchy for the time being had always been used to grant leases of estates held thereof to such persons as he thought fit, without regard, and without giving notice to the lessees or tenants in possession thereof; and though the respondent believed, that previous to the grant of the said lease to him, and after his personal application to Lord *Edgecumbe*, and his compliance with the respondent's desire, a petition had been presented to Lord *Edgecumbe*, to the effect stated by the appellant, yet that such petition was prepared as a matter of course, and in compliance with the forms of the office, without the respondent's direction or privity, and to the best of his remembrance was not signed by him: and he declared by his answer, that he never did assert, either to Lord *Edgecumbe*, or any other person, that he should have been entitled to the said leasehold premises, had they not been disposed of by the said *Edward Vernon*, nor did he obtain the said lease on any such or the like suggestion, but merely as being heir-male of the said *Edward* and *Henry Vernon*, and of the senior branch of the *Vernon* family, and in possession of the family seat and estates in the neighbourhood of the said leasehold premises, and as a matter of friendship from Lord *Edgecumbe*, and a favour from the crown to the respondent, whose relation *Edward Vernon*, originally obtained the grant of the said parks from King *Charles* the Second in consideration of many acceptable services, and in particular of money, to a considerable amount, advanced to the king during his exile at *Breda*.—To this answer the appellant replied, and passed publication, but did not examine any witnesses.—Upon the hearing of the cause, *Feb.* 24th, 1775, the court was equally divided, the Lord Chief Baron *Smythe* and Mr. Baron *Eyre* being of opinion, that the bill should be dismissed; Mr. Baron *Perrot* and Mr. Baron *Burland* being of opinion, that the respondent should be declared a trustee of the lease in question for the benefit of the appellant. In consequence of this equal division, the cause was to have been heard before the Chancellor and Barons of the Exchequer, but before it came on Mr. Baron *Perrot* died, and therefore it was recommended by the court to the parties, that

that the bill should be dismissed without farther argument, in order that the appellant might appeal; and the bill was thereupon ordered to be dismissed, but without costs. Upon the appeal, the Lords affirmed the order of dismissal, but without prejudice to any application which the appellant had made, or might make, to the officers of the crown, as to the manner of their executing, in this case, the trust reposed in them by his Majesty.

Where a lessor has *expressly* covenanted to renew, what shall be the extent of such covenant, whether it shall be satisfied by the lessor's once renewing, or whether it shall amount to an engagement for a perpetual renewal, is a question, the decision of which must depend upon the words in which the covenant may be expressed, and the conduct of the parties, and particular circumstances of each case.

In a demise of corn-mills for 21 years, there was a covenant on the part of the lessor, that "if the lessee, his executors, &c. should, before the expiration of the term, be minded to renew, then, upon application, &c. the lessor, his heirs or assigns, should grant such further lease, as should by the lessee, his executors, &c. be desired, without any fine to be demanded therefore, and under the same rents and covenants only as in the then lease." The question was, whether there must be a covenant for renewal again in the second lease? The court of Exchequer were of opinion, that under the words *the same rents and covenants*, the covenant for renewal ought to be inserted; and on appeal to the House of Lords, their decree was affirmed.

Bridges v.
Hitchcock,
1 Br. P. C.
522.

Again, in a lease for three lives, the lessor covenanted, that he, his heirs, &c. should and would (in consideration of a certain sum to be paid to him, &c. at *Crewe Hall*, or at the place where the said Hall then stood, in the name of a fine, for adding one life to the remaining lives therein before mentioned) execute one or more leases, *under the same rents and covenants* which were expressed in the then lease, and so to continue the renewing of such lease or leases to the lessee or his assigns, paying as aforesaid to the lessor, his heirs or assigns, the sum before mentioned for every life so added or renewed from time to time. Lord Hardwicke held this to be a covenant for perpetual renewal, and decreed a new lease to be granted to the assignee of the original lessee with a covenant inserted in it to that effect.

Furnival v.
Crewe,
3 Atk. 83.

Again, in such a lease, the lessor had covenanted, that if the lessee, his heirs, &c. should be minded, upon the falling in of any of the lives, to surrender the demise and take a new lease; and thereby add a new life to the then two in being in lieu of the life so dying, that he, the lessor, his heirs, &c. upon payment of so much for every life so to be added, in lieu of the life of every of them so dying, would grant a new lease for the lives of the two persons named in the former lease, and of such other person, as the lessee, his heirs, &c. should nominate in lieu of the person named in the preceding lease, as the same should respectively die, *under the same rents and covenants*. There had been successive renewals from the time of the first lease; and in every lease the like

Cook v.
Booth,
Cowp. 819.

covenant for renewal had been inserted. The court of King's Bench held, that the lessors, by *their own acts* had construed this to be a covenant for perpetual renewal.

Hyde v.
Skinner,
2 P. Wms.
196.

But where a lessor covenanted to renew the lease at the same rents and upon the same covenants on the request of the lessee within the term, Lord *Macclesfield* held, that though the new lease was to be made on the same covenants, yet that should not take in the covenant for the renewing of the new lease, so far as much as then the lease would never be at an end.

Ruffell v.
Darwin,
2 Br. Ch.
Rep. 639.
n.

So, where in a lease for years determinable upon lives, the covenant was, that the lessor would, upon the death of any of the appointees (by name), add a new third life upon payment of 200*l.* within six months; or upon the death of two of them (by name) within six months add two new lives upon payment of 500*l.*; or upon the death of all of them (by name) would, upon payment of 1150*l.* make a new lease or grant for any three new lives to be nominated and appointed by the lessee, his executors, &c. for the like term as was thereby demised, *at and under the like rent, covenants, and agreements therein contained*; Lord *Camden* was of opinion, that the lessors were not under any obligation to grant any farther lease than for three lives only, and that the lessee was not entitled to have any covenants inserted for a farther renewal; the words of the covenant not requiring the lessor to grant a new lease, but upon the death of some one of the persons named in that lease, and when they were all dead, no further renewal could be claimed.

Tritton v.
Foote, 2 Br.
Ch. Rep.
636.

So, under a covenant in a lease for 21 years, that the lessor, his executors, &c. would, at the end and determination of the said term of 21 years, execute a new lease of the demised premises, for the further term of seven years, to commence from the end of the said term of 21 years, thereby demised, *subject to the same rents, and pursuant to the same exceptions, covenants, reservations, conditions, and agreements in all respects, as were in and by the then granted indenture of lease mentioned and expressed*, in case the lessee, his executors, &c. should desire the same; the lessee, his executors, &c. first giving twelve months notice in writing to the lessor, his heirs or assigns, of his or their desiring such farther term of years as aforesaid; Lord *Thurlow* held the lessee entitled to a lease for seven years only, it appearing that the lessee himself had put that construction upon it.

Vipont
Charles v.
Rowley,
Ca. in the
House of
Lords,
1774.

Sir *A. Langford* Bart. being seised in fee of several farms and lands in the county of *Meath*, on the 22d of *March* 1697, demised the same to *John Charles*, his heirs, executors, administrators, and assigns, during the lives of *Alice Charles* his wife, *Richard Charles* their eldest son, and *John Ward*, and the longest liver of them, at the rent of 366*l.*, payable half-yearly, with the following clauses of renewal, viz. "That if the said *John Charles*, his heirs, executors, administrators, and assigns, within one full year next after the decease of any of the said persons, for whose lives the present demise and lease is taken, shall pay 100*l.* of good and lawful money, within the like space and time next after such

"decease

"decease as aforesaid, by way of fine, to the said Sir *A. Lang-*
 "ford, his heirs and assigns, he the said Sir *A. Langford*, his heirs
 "or assigns, to whom such payment of 100*l.* shall be made as
 "aforesaid, having then the immediate inheritance of the said
 "lands and premises, and such person or persons that shall make
 "such payment of the sum of 100*l.* by way of fine, then having
 "two lives still in being, and undetermined of this demise; and
 "the said person or persons then paying the sum of 100*l.* by way
 "of fine as aforesaid, then likewise tendering to the said Sir *A.*
 "*L.*, his heirs and assigns, having the immediate inheritance of
 "the said lands and premises, a pair of deeds of indenture of
 "lease, fairly drawn and ingrossed on parchment, purporting a
 "deed of all and singular the said lands and premises, for the said
 "two surviving lives, mentioned and contained in these presents,
 "and for the life of such other person as shall be nominated and
 "appointed by such person and persons, paying such sum of
 "100*l.* by way of fine, and for the natural life of the longest
 "liver of them, and under such reservations of rent, covenants,
 "conditions, agreements, and clauses of renewal, as in the said
 "indented deeds are specified and contained;—that then, and in
 "such case, he the said Sir *A. L.*, his heirs or assigns, having the
 "immediate inheritance of the said lands and premises, and hav-
 "ing received the said fine of 100*l.*, shall seal, deliver, and per-
 "fect such new indenture of lease, so to be presented as aforesaid.
 "—Provided, that the person or persons paying the 100*l.* fine
 "as aforesaid shall, at the same time, deliver and perfect, as his
 "act and deed, a counter-part of such new indenture of lease,
 "and make sufficient surrender of the remaining interest hereby
 "granted, and deliver up this present indenture to be cancelled.
 "And it is further concluded and agreed by and between the said
 "parties to the said indented deed, that the said Sir *A. L.*, his
 "heirs and assigns, having the immediate inheritance of the said
 "lands and premises, shall, from time to time, and at all times
 "for ever hereafter, make all such further and other renewals
 "and leases of the said lands and premises, unto the said *John*
 "*Charles*, his executors, administrators, and assigns, for three
 "lives, *viz.* the two remaining lives, and one other life to be no-
 "minated, at and under the reservations of rents, covenants, con-
 "ditions, agreements, and clauses of renewal, as in the said in-
 "dented deed are specified and contained.—Provided, that the
 "parties requiring such renewal pay unto the said Sir *A. L.*, his
 "heirs or assigns, having the immediate inheritance of the said
 "lands and premises, the sum of 100*l.* by way of fine, for every
 "and each renewal, within the year next after the decease of
 "each of the said lives respectively. And provided, that all
 "former leases thereof be then sufficiently surrendered and can-
 "celled." There was no covenant on the part of the lessee to
 "pay the fine on renewal, or to accept a new lease *toties quoties*: nor
 "was any fine paid on the execution of this lease. *John Charles*
 "entered and had possession under the lease. On the 9th of *March*
 "1710, *Alice Charles*, one of the *cestuy que vies*, died, but no appli-

cation was made for a renewal within the year, or for many years afterwards, though the lessee was frequently pressed by Sir *A. L.* to clear his arrears of rent, and take a renewal. In 1716 Sir *A. L.* died, having devised the estate to his nephew *Hercules Rowley*, the respondent's late father. In 1719 the lessee *John Charles* first made application for a renewal of the lease, and he then tendered to Mr. *Rowley* 100 *l.* as a fine for the renewal, with interest from the 9th of *March* 1711, being after *Alice Charles* the *cestuy que vie*'s death, together with a further 100 *l.* for a second renewal, (upon a supposition that if the lease had been regularly renewed on the 9th *March* 1711, and a life then inserted, such life would have subsisted no longer than seven years,) and interest also upon that last sum. He at the same time tendered a pair of leases, purporting a renewal for the life of *Thomas Hendrick* in the room of *Alice Charles*. These tenders being refused, and the renewal denied, *John Charles* immediately filed a bill against Mr. *Rowley* in the court of Exchequer in *Ireland*, *inter alia*, to compel him to renew. By a decree of that court of the 21st *February* 1723, this bill, so far as it related to a renewal of the lease, was dismissed. No motion was made to re-hear the cause; nor was there any attempt to reverse the decree. In 1746 *Richard Charles*, another of the *cestuy que vies* named in the lease, died, and within a few days of the expiration of the year after his death, a proposal was made to the respondent on the behalf of the appellant, who was the grandson of *John Charles* the original lessee, and entitled to an estate-tail in this leasehold estate under his will, for a renewal. This proposal the respondent refused to accede to, but apprehending from it that the appellant intended to pursue his claim to renewal, and being desirous that such claim should be brought to an early decision, he wrote to the appellant, offering to do every reasonable act to contribute to bring the matter to a conclusion with all possible dispatch. The appellant, however, acquiesced above six years longer, till 17th *September* 1754, when he filed a bill in nature of a bill of revivor of the suit which had been dismissed in 1723. But this bill, after several amendments and demurrers, was dismissed at the appellant's own request in *Trinity* term 1759; and in the *Michaelmas* term following he filed another bill as a new original bill, praying, that the respondent might be compelled to renew the lease of the premises, by executing a new lease thereof for the lives of the said *John Ward*, his present majesty, and the duke of *York*, with such reservations, conditions, covenants, clauses, and agreements as specified in the lease made to *John Charles*, upon the appellant's making such compensation or satisfaction to him for the same as to the court should seem just and equitable; and that the appellant might have an allowance for the costs and expences sustained by *John Charles*, and might be quieted in the possession of the lands; and that the respondent might be enjoined from proceeding at law concerning the premises till the hearing. To so much of this bill as sought a renewal of the lease; that the appellant might be quieted in the possession of the premises; and the respondent be enjoined from proceeding at law;

law; or a discovery of such matters as were, or might have been in issue in the former cause, on certain particulars, which were afterwards answered, the respondent pleaded in bar the former bill and decree in the court of Exchequer in 1719 and 1723. This plea came on to be argued before the court of Exchequer on 30th *December* 1763, when the court allowed the plea, but without prejudice to such other methods of proceeding as the appellant might be advised to take, in order to obtain the relief sought by his bill. This order however was reversed by the House of Lords in *England*, and the plea was directed to stand for an answer, with liberty to except and to save the benefit thereof to the hearing. On the 20th of *May* 1765 *John Ward*, the last *cestuy que vie*, died, and the bill being amended in order to put that in issue, the cause came on to be heard on the 12th of *November* 1772, when it was decreed by the court of Exchequer that the bill should be dismissed, but without costs. From this decree the appellant appealed to the House of Lords, where it was affirmed.

Apr. 14th,
1764.

By articles in writing of 4th *October* 1734, *James Hamilton* demised to *Gustavus Hamilton* the respondent's father, lands and mills in the county of *Monaghan*, to hold for the lives of the said *Gustavus Hamilton* and his two eldest sons, the respondent and *George Hamilton*, and the survivor of them, at the yearly rents therein mentioned, which the said *Gustavus* covenanted to pay: and it was agreed, that leases should be perfected at the request of either party, containing a covenant of re-entry and distress, as also a covenant of renewal for ever, paying half a year's rent as a fine in six months after the fall of every life then named, and thereafter to be named. At the time when this demise was made, the fee of *James Hamilton's* estate was in fact in *Nathaniel Kane*; a mortgagee of it, to whom it had been conveyed absolutely, by under-tenant lease and release in 1729: but *Mr. Kane* had permitted *Mr. James Hamilton* to continue in possession of it, and verbally promised to re-convey it to him, upon his re-payment of the purchase-money and interest within five or six years. *Mr. J. H.* however, not having re-paid the money within that time, *Mr. Kane* entered into possession, and shortly afterwards applied to *G. H.* to attorn tenant. In answer to this application *G. H.* said, that the rent was too high, and that he would give up the lands unless *Mr. K.* let them to him at a lower rent. *Mr. K.* thereupon consented to refer the yearly value of the lands to the consideration of two persons, who valued them at 30*l.* a year; in consequence of which *Mr. K.* consented to *G.'s* continuing tenant at will at that rent. About the year 1752, *G. H.* being in arrear for the rent of the said premises, requested *Mr. K.* to take them off his hands, and to forgive him the arrears; upon which *Mr. K.* directed his agent, *John Speer*, to conclude this business with *G. H.* on his own terms. *Speer* and *Hamilton* accordingly settled matters between themselves, and the latter, about *November* 1752, gave up the possession of the lands to *Mr. K.*, either by a formal surrender, or by some writing purporting in substance to be a surrender, of which *Speer* soon after informed *Mr. K.*, who rested satisfied with

Kane v.
Hamilton,
Ca. in the
House of
Lords,
1776.

his account of the transaction without making any further inquiry. Soon after this, *G. H.* came to *England*, where he resided till *August* 1755, when he died intestate, leaving the respondent his eldest son and heir. In 1757 *Mr. Kane* died, and the appellant his son and heir entered, and continued in quiet possession of the premises from that time till the year 1763, when the respondent applied to him for a renewal of the lease, pursuant to the articles. This being the first intimation the respondent received of the articles, or that any person claimed any interest in the estate under *G. H.* he communicated the same to his agent *Edmund Weld* in *Ireland*, he being himself at that time in *England*, and directed him to make strict inquiry into the respondent's claim. *Weld* accordingly wrote to *Speer*, informing him of the claim; and received an answer from him, in which he stated, that *G. H.* had made an actual surrender of the lease, which he (*Speer*) had given to *Mr. Kane*, and that he (*Speer*) had another actual surrender of it to *Mr. K.* A copy of this letter was sent by the appellant to the respondent, who never made any further claim during *Speer's* life, but soon after his death he filed a bill against the respondent in the Exchequer, praying to be restored to the possession of the premises, and that the appellant might be obliged to perfect leases thereof to him, renewable for ever, at the yearly rent of 36*l.*, and to account with him for the rents and profits since the death of *G. H.*, and pay him what should appear to be due on such account. The respondent having put in his answer, and issue being joined, the appellant filed a cross bill, praying that the respondent in the original bill might search the papers, books, and entries of the said *Gustavus Hamilton*, and if there was any copy or entry of the said surrender, or any letter or acknowledgment from the appellant of his acceptance thereof, or relative thereto, that he might set forth the same *in hæc verba*, and might bring the same into court. It appeared, and was so admitted by the respondent's answer to the cross bill, that upon the death of *George Hamilton*, one of the *cestuy que vies*, in 1747, no application was made to *Mr. K.* for a renewal, nor was any step taken to enforce a specific execution of the articles, or to have a life inserted in his stead. It was also admitted by the respondent in his answer, that the great rise in the value of lands in *Ireland* since the year 1752, was the main inducement with him to attempt the recovery of the possession of this estate. But the respondent said, that he had been informed by *G. H.* that he never had made any surrender of the lease; in answer to which the appellant offered in evidence several letters of *Speer* to prove the fact of surrender; but these letters the court rejected, and decreed, that the respondent was entitled to a lease for three lives renewable for ever, and dismissed the cross bill with costs. Upon appeal to the House of Lords in *England*, this decree was reversed, and the respondent's original bill was dismissed.

Feb 7th,
1776.

Bateman v.
Murray,
Cases in the
House of
Lords, 1779.

Edward Edwards being seised in fee of the manor of *Hastings*, and the lands therein comprised, situate in the county of *Tyrone*, by indenture bearing date the 28th *October* 1685, gave, granted, enfeoffed,

enfeoffed, and in fee-farm let unto *Thomas M^cCausland*, his heirs and assigns, the two town-lands of *Claraghmore* and *Seagully*, being part of the lands comprised in the said manor, to hold the same to him, his heirs and assigns, in fee-farm for ever, viz. for the term of his natural life, and the natural lives of his two sons, *Andrew* and *John M^cCausland*, and the longest liver of them, at the clear yearly rent of 15 l. sterling, with two year old bullocks and one fat mutton. In the indenture there was contained (*inter alia*) a power of entry and distress for the rent, when in arrear, and an agreement, *that upon payment to the grantor or his heirs or assigns, of the sum of 7 l. 10 s. sterling, within three months after the fall of each of the said lives, he or they would add another life instead thereof, by a new indenture, continuing three lives for ever*; and a further agreement, that the said *Thomas M^cCausland*, his heirs and assigns, should make appear, at every *Easter* court-leet, and view of frankpledge, to be holden for the said manor, by two sufficient witnesses duly sworn, that the said three lives were then in being, in default whereof, it should be lawful for the said *Edward Edwards*, his heirs or assigns, to distrain for the said fine, although all the said lives should be then in being. But there was not any power of re-entry reserved to the grantor, in case of non-payment of the said rent or fines, nor was there any clause which declared the rent void, if the grantee should neglect to renew. In the year 1708, the original indenture and the lands therein comprised having become vested in the respondent's grandfather *James Murray*, and it being doubtful whether two of the lives, named in that deed, had not fallen, the estate was renewed by *Thomas Edwards*, the son and heir of the grantor, according to the terms of the original, and two new lives were inserted in the room of those supposed to be fallen. In 1724 *James Murray* conveyed his interest in the estate to his son *George Murray*, by virtue of which he entered into possession, and enjoyed the lands till his death; and during all that time paid the reserved rent. The said *Thomas M^cCausland*, one of the lives named in the deed of renewal of 1708, died in the year 1741; *James Murray*, another of the said lives, died in the year 1746; and the said *George Murray*, the other of the said lives, died in 1763 intestate, leaving the respondent *Sophia* his widow, and the respondent *William* his eldest son and heir, then a minor, who thereupon became entitled to the said lands, under a marriage settlement, subject to a jointure to the respondent *Sophia* his mother. At this time, the appellant, the Countess of *Ross*, who was the grand-daughter of *Thomas Edwards*, under whom the lease was renewed, and who was entitled to these lands under her father's will, resided in *England*, where she continued till some time in the latter end of the year 1763, or the beginning of 1764. Soon after her return to *Ireland*, the respondents caused deeds of renewal to be prepared, pursuant to the covenants for that purpose in the original indenture of *October* 1685, and sent the same to the countess, with a sum of money, as they alleged, sufficient to pay her all the renewal fines, with interest, which would be due to her on her executing such deeds of renewal. Instead of

complying

complying with this application, the countess brought an ejectment, in *Easter* term 1763, for the recovery of the premises in question; upon which, before any judgment was obtained, the respondents in *June* 1765 filed their bill in the court of Chancery in *Ireland* against the appellants, PRAYING, That she might be compelled to execute a new lease of the premises in question, pursuant to the covenant for renewal in the said original indenture of *October* 1685, under the rents and with the covenants in the said indenture contained; and that she might be restrained in the mean time by injunction from proceeding in the said ejectment. The appellant, Lady *Ross*, by her answer insisted, that the respondents were not entitled to a renewal upon two grounds; the one was, an agreement made between *James* and *George Murray* with her father *Hugh Edwards*, and in part carried into execution, for the purchase of their interest in the premises; the other was, that neither *George Murray* nor the plaintiffs had complied with the terms of the covenant for renewal, by not paying or tendering the fine within three months after the death of the lives. Issue being joined, several witnesses were examined on each side. The cause came on to be heard before the Chancellor of *Ireland* on the 20th of *July* 1772, when the following issues were directed to be tried, *viz.* Whether any, and what agreement was entered into by the said *James* or *George Murray* for a sale of their interest in the said lands, and of the said lease thereof? And in case there was any agreement, whether the same was carried into execution, or whether the same was varied, or departed from, by the parties thereto, or either of them? The jury, by their finding, negatived any such agreement at all. The cause afterwards came on to be heard on the judge's certificate and merits, when the respondents' right of renewal was contested on the ground of laches in having neglected to renew; but the Chancellor was pleased, on the 22d *April* 1777, to order and decree, that the respondents were entitled to a renewal of the said lease, according to the true purport and intent of the said deeds of *October* 1685 and *November* 1708, upon payment of the several fines and interest; and of the rent and arrears of rent and duties become due. From this decree, and the said decree or order of 20th *July* 1772, the appellants appealed to the House of Lords in *England*, when their lordships were pleased to order and adjudge that the decrees be reversed, and the respondents' bill dismissed.

Feb. 18th
1779.
This rever-
sal, though
perfectly
consonant

to English principles, gave great dissatisfaction, and occasioned considerable alarm in *Ireland*. It was said to clash with a local equity, the old equity of that kingdom, where these leases were considered on both sides as a kind of inheritance; where they had been introduced soon after the country was recovering from the convulsions of the great rebellion in the last century, for the purpose of raising an useful and respectable tenantry, and the improvement of agriculture, and where, upon that policy, they had ever been protected and preserved by the courts of equity, whose practice it had invariably been, to fill up the lives, upon the tenant's neglect to renew, provided there was one life still subsisting, that is, provided there was a legal estate for the equity to attach upon. In consequence therefore of this alarm, an act was passed on the 19th and 20th of the King, c. 30. which revives the old equity, and provides, that in all cases of mere neglect, where no fraud appears to have been intended, no dereliction on the part of the tenant,* by neglecting or refusing to renew after the landlord has demanded the fine, courts of equity shall relieve upon an adequate compensation being made. See *Vernon and Scriven's Reports of Cases in Ireland*, p. 135. and the case of *Magrath v. Lord Muskerry* in the same book, p. 166.

In a lease granted in 1739, by the mayor and burgesſes of *Leominſter* for 99 years, determinable on three lives, there was a covenant on the part of the leſſors, "that they and their ſucceſſors, when and as often as either of the ſaid three lives ſhould die, and there ſhould be *only two lives remaining in the premiſes*, "if the leſſee, her executors, adminiſtrators, or aſſigns, ſhould, "within the ſpace of ſix months next enſuing the deceaſe of ſuch life, or at the firſt or ſecond chamber which ſhall be held after "the expiration of the ſaid ſix months, apply for a new lease of "the ſaid premiſes, and pay a fine of 4*l.* for a new lease of the "ſaid premiſes, and pay the ſum of 4*l.* to the bailiff, &c. with "ſix months intereſt for the ſaid 4*l.*, after the rate of 5*l.* per cent. "the ſaid bailiff, &c. ſhould add a third life in the ſaid premiſes, "and grant to her or them a new lease of the ſaid premiſes for "99 years, to commence from the time of ſuch payment, if the "two other lives, and ſuch other life as ſhould be nominated by "the ſaid leſſee, her executors, &c. or either of them, ſhould ſo "long live, under the like rents, covenants, and agreements, and "to the ſeveral uſes and truſts therein before declared, and ſo "from time to time ever after, as often as the caſe ſhould ſo happen." There were ſeveral renewals of this lease on account of the death of the *ceſſuy que vies*: the laſt was in the year 1763, and the lives for which the lease was then granted, were *Adam Ward* and *Mercy* his wife, and the plaintiff's. In 1764 *Adam Ward* aſſigned for a valuable conſideration the beneficial intereſt in the lease to the plaintiff, who entered under ſuch aſſignment. *Adam Ward* died in 1781 and his wife in 1789, and ſoon after her death, the plaintiff applied to the corporation for a new lease, offering to pay them 4*l.* with intereſt from the death of *Adam Ward*, and alſo 4*l.* as a fine for renewal, on the death of *Mercy Ward*, and a further ſum of 4*l.* upon a ſuppoſition, that if plaintiff had renewed the lease on the death of *Adam Ward*, by putting in another life, ſuch other life might have fallen in between the death of *Adam Ward* and *Mary Ward*. This the corporation reſuſed, inſiſting, that no application having been made to renew till the falling in of the ſecond life, they were not bound to renew upon the terms of the covenant, but were at liberty to impoſe ſuch terms as they pleaſed. It was contended on the part of the plaintiff, that, although the covenant was only to renew on the falling in of one life, yet the ſpirit of the covenant extended to the caſe of two lives falling in: that the caſe lay in compensation, and that no forfeiture is to be incurred when compensation can be made. But Lord Chancellor ſaid, the caſes upon *Iriſh* leases in the Houſe of Lords went the whole length of this caſe; that the plaintiff was not bound to renew upon the falling in of one life; he had his election whether to renew or not, and has made that election; the corporation therefore are not bound now to renew. It has been determined over and over in the *Iriſh* caſes.

Bayley v.
the Corpo-
ration of
Leominſter,
3 Br. Ch.
Rep. 329.

However, where a compensation can be made, where the tenant's neglect can be reaſonably accounted for, it is the general diſpoſition

Sweet v.
Anderson,
2 Br. P. C.
430.

disposition of courts of equity to relieve in a lapse of this kind. The measure of compensation introduced in *Ireland* by the Lord Chief Baron *Gilbert* was, by allowing the lessor septennial fines; that is, by giving him a fine for every seven years which had lapsed since the fall of a life, and interest upon each fine from the time of its being supposed to have accrued due, calculating from the probabilities of human life, that if another life had been added at the regular period of renewal, the duration of such life would not have exceeded the term of seven years. This was first done in one of the Duke of *Ormond's* leases: the Duke had granted a lease in 1697 for the lives of the lessee, and his nephew *John Anderson*, and *V. B.*, and of the survivor, and had covenanted; "that as often as any of the lives should happen to fail, he would at the request of the lessee, his heirs or assigns, and upon payment of all rents of the said premises, that should be then in arrear; and advancing and paying, by way of fine, within twelve calendar months next after the death of each life, 16*l.* 13*s.* 4*d.*, renew, and make a new lease of the said several lands, &c. to the lessee, his heirs and assigns, at and under the yearly rent and reservations, and with the covenants, conditions; and provisos contained in the said lease; with the like clause for being dispunishable of waste, and the like covenant for renewal of such two lives, as should be then in being, and also for one other life, to be added in the place and room of such of the three lives as should, from time to time, happen to fail. Provided, that, if when such new lease or renewal was to be made, more than one of the *cestuy que vies* beforementioned should be dead, there should be named in such lease so many other lives in their stead; and there should be paid to the person renewing a fine, of the value aforesaid, for each of the said *cestuy que vies*, who should be dead at the time of such renewal." The lessee himself died in 1714, and upon his death the respondent, who was the devisee of this estate, applied to the appellant, who had purchased the Duke of *Ormond's* reversionary interest, for a renewal of the lease, and that another life might be inserted in the room of that which had dropped; and at the same time tendered the fine of 16*l.* 13*s.* 4*d.*, all rent and arrears being discharged; but the appellant refused to renew, insisting that *John Anderson*, one of the *cestuy que vies*, had been absent from *Ireland* ever since the year 1697, and therefore must be presumed to be dead, and that no tender of a fine for renewal having been made within twelve calendar months after his absence, the respondent had lost his right of renewal. The respondent thereupon filed his bill in the court of Exchequer to oblige the appellant to renew the lease by inserting a new life in the room of the lessee's: but it appearing that *John Anderson*, the other *cestuy que vie*, had been a long time absent from *Ireland*, and there being no positive proof of his being alive, the court ordered the bill to be amended by inserting a tender of the fine for the second life; and the respondent having made such tender, and amended his bill accordingly,

Accordingly, they decreed the appellant to renew, and make a new lease to the respondent for the lives named in the bill, and according to the covenant in the lease, on the respondent's paying the appellant 16*l.* 13*s.* 4*d.*, with interest from the 19th July 1704; another sum of 16*l.* 13*s.* 4*d.*, with interest from the 19th of July 1711; another sum of 16*l.* 13*s.* 4*d.*, and interest from the 19th July 1718; and on the respondent's also paying to the appellant the sum of 16*l.* 13*s.* 4*d.*, being the fine due on the death of the lessee; and all rents in arrear, duties, &c. pursuant to the lease. And this decree, upon appeal to the House of Lords, was affirmed.

A lease was granted for 21 years, under the yearly rent of 1*l.* with a covenant on the part of the lessor to renew before the end of the term for 21 years, and to renew from the end of such term for 21, 21, and 15 years more, making in the whole a term of 99 years. It was in effect, and so understood by the parties to be, a lease for 99 years, but the estate being copyhold holden of a manor in which no lease could be granted for more than 21 years, this mode was necessarily adopted in order to avoid a forfeiture. At the expiration of the first term, there being an arrear of rent due, and no application made for a renewal, the executor of the devisee of the lessor brought an ejectment, and obtained judgment and possession. But as when this ejectment was brought, the lessee was under difficulties, he being then a bankrupt; as it did not appear that there was not a sufficient distress upon the premises; as on the contrary it appeared, that the lessee had laid out a large sum of money upon them; as it was also in evidence, that the person to whom the lessee had mortgaged them, had endeavoured to stop the suit, by a treaty for a new lease, which had been refused; as the covenant did not expressly require any request from the lessee for further terms;—under all these circumstances, the Master of the Rolls held the lessee entitled to renewal on payment of the arrears of rent with interest, and the costs both at law and in equity.

Rawstorne
v. Bentley,
4 Br. Ch.
Rep. 415.

That this indulgence in the courts of equity in the case of a tenant's neglecting to renew, is not of modern date, and that it hath been long ago carried to a considerable extent, will appear from the case immediately following, but which is cited for another purpose.

A court of equity in decreeing a renewal, will not always adhere to the literal import of the clause upon which such renewal is directed to be granted, but will regulate the term according to what it conceives to be the spirit and sound reason of the clause; as in the following cases. An estate was devised for the purpose of founding an hospital: the trustees procured letters-patent for that purpose, with power for them to make orders and constitutions for governing the hospital; under which they ordained, that no lease should be made for above 21 years, the rent not to be raised, nor above three years rent to be taken for a fine, or *gressom*. The estate was originally leased at 120*l.* *per ann.* On a bill by the

Watson v.
Hinsworth
Hospital,
2 Vern. 596.

Master

Master and Hospital, Sir *Edw. Phillips* decreed the lessee to enjoy, paying 120 *l. per ann.* and afterwards the case was heard again by Lord *Ellesmere*, and although the lease was long before expired, his lordship decreed the lessee to account at 120 *l. per ann.* only, and to have a new lease for 21 years at that rent, notwithstanding it appeared the estate was, by the tenant's improvements, then worth 250 *l. per ann.* In 1663 it was decreed again by Lord *Clarendon*, assisted by *Hide*, C. J. and *Hale*, C. B. that the lease, having been some time expired, the tenant should account from the expiration of the lease, at 120 *l. per ann.* and that he should have a new lease on reasonable terms, and recommended it to the Archbishop of *York*, to call the parties before him, and to certify what terms were thought reasonable for a lease, who certified the hospital had agreed to accept a fine of 100 *l.* and 120 *l. per ann.* The present tenant having purchased the lease, and laid out a considerable sum in improvements, filed a bill for renewal.—Lord Chancellor—The constitution that the rent should not be raised, is just and charitable, for the encouragement of the tenant to improve the estate; and he ought to find a benefit in it; and the hospital will also find an advantage in having the rent well secured by an estate of greater value and constantly paid. But the rule or constitution is not to be followed according to the letter, that no more rent is to be taken than what was at first reserved; but as times alter, and the price of provisions, &c. increases, so the rent ought to be raised, in proportion. The tenant is entitled to a beneficial lease, but not at any certain rent: the constitution is not to be regarded in the letter, but in the reason of it. His lordship therefore referred it to the Master to certify the value of what had been laid out in improvements, and when that was ascertained, he referred it to the Archbishop of *York*, to certify what fine and what rent he thought reasonable.

Attorney-
General v.
Smith,
2 Vern. 746.

So, where a decree had been made by the Lord *Coventry*, for granting a lease of charity lands to *J. S.* (who had been at great expence in recovering them) for 99 years, determinable upon lives, at the rent of one third of the then improved value, to be renewable from time to time for ever without fine according to the value of the lands settled by a commission of survey directed by the court for that purpose; it was decreed, that the lease should be renewed *toties quoties* without fine, but that the rent was not to be computed according to the value of the land at the time of the decree, but according to the real improved value of the estate at the time of every renewal.

In mortgages and settlements of leases of this kind, it is usual to insert provisions for renewal. In mortgages, there is generally an agreement, that if the mortgagor neglects to renew, it shall be lawful for the mortgagee to renew, and that the fine and charges of renewal, shall be a charge upon the premises, and bear interest. In settlements, there should be a power authorizing the trustees, from time to time, to renew the leases, and for that purpose, to raise money by mortgage.

Where

Where such a provision is not inserted in a mortgage, the mortgagee cannot indeed compel the mortgagor to renew, but he may do it himself, and the money which he may so lay out shall be added to the principal of the mortgage, and carry interest.

Manlove
v. Ball,
2 Vern. 84.
Lucam v.
Martins,
3 Atk. 4.
1 Wilf. 34. S. C.

Upon the omission of such a provision in a settlement, the expences of renewal are to be borne by the several persons interested in the estate in proportion to their respective interests. The old rule of ascertaining this proportion was by making the tenant for life pay one-third of the expence or keep down the interest, and the remainder-man the other two-thirds. This rule perhaps may be proper where the nature of the estate, the will of the testator, or the circumstances of the case compel a renewal; but as a general rule, it would frequently be wrong: for suppose the devisee or grantee for life to be one of the persons upon whose life the estate is holden, and a renewal to be made by him; in this case, as there is no obligation upon him to renew, as the law will not permit him to renew but on the trusts of the settlement, and as he cannot possibly in any way enlarge his own interests, the fine and expence of the renewal must, in justice, be paid entirely by the remainder-man. This is evidently the case, where the devisee for life has the legal estate, and it should seem, that it is the same, where he is a *cestuy que trust*. Suppose again, an estate of limited duration, as an estate for years, or for the lives of strangers, to be limited to one for life, without any obligation upon him to renew; if such a person renew, it is manifest, that the contribution of a third must, in most cases, be very unfair and unequal. The true rule therefore in such case must evidently be, that the proportion follow the benefit; that the contribution of a person having such limited interest in the estate; and voluntarily renewing, shall only be in proportion to the benefit which he actually derives from such renewal.]

2 Vez. 429.
Ambl. 88.
2 Br. Ch.
Rep. 244.
2 Vern. 666.
2 Vez. 429.
2 Vez. jun.
652.

Addis v.
Clement,
2 P. Wms.
459. Night-
ingale v.
Lawson,
1 Br. Ch.

Rep. 440. Stone v. Theed, 2 Br Ch. Rep. 243. If the estate be charged with annuities, the annuitants are not bound to contribute to the expence of renewal. Maxwell v. Ashe, Nov. 6, 1752. 1 Br Ch. Rep. 444. n.

Legacies and Devises.

Domat, lib.
3. § 1.

[A WILL and testament may be considered in two very distinct lights according to the different subjects upon which it operates, either as it disposes of real, or of personal property. A will of lands is a conveyance or donation *mortis causâ*, a limitation of the testator's estate by a revocable act: it constitutes no heir, creates no representation, but passes the estate merely of itself without any further act. On the contrary, the constitution of an heir is essential to a will of personal estate; for if there be no heir constituted, the instrument is not strictly and properly a will; and as no testamentary disposition of personal property can be administered without the interposition of the representative, the law upon the deceased's omitting to appoint a representative, or the appointee's refusing to act, takes upon itself to nominate one. The instrument in the latter case was borrowed from, and is framed upon, the *Roman* law; the instrument in the former case has no reference to that law; and not having the form of a will properly so termed, it has therefore been called a *devise*. However, as the restraint which the feudal law imposed upon testamentary alienations of lands, and which occasioned the above distinctions, is now taken off; and as the statutes of *H. 8.* have enabled mankind to dispose of real estates by will and testament, the term "will" seems now sufficiently comprehensive to be used in a general sense; and therefore the word "devises" may rather be applied to those parts or clauses of the will which convey a title to real estate, whilst those parts which relate to personal chattels may be distinguished by the name of "bequest." Not that, though it be now allowed to convey both species of property by an instrument nominally the same, the old distinctions are therefore entirely obliterated; for the will is still in effect a distinct instrument, as it relates to the one or to the other species. To a bequest or legacy, the assent of the representative is required; not so to a devise, for a devise creates no representative. So far as respects the personality there is a probate of the whole instrument; and the probate is evidence for every legatee; but as to the real estate there is no probate, the spiritual court having no cognizance of the instrument as a devise; the will may be void as to one devise, and

* * It was the intention of the Editor of the fifth edition of this work to reduce the whole doctrine relating to wills under the head of "Wills and Testaments," and with that view, the learning of Devises was omitted in the second volume. But it has since occurred to him, that an objection might possibly be made to this change in the arrangement, inasmuch as it would be blending that part of the book which is generally attributed to the Chief Baron Gilbert, with the labours of later compilers. He therefore thought it better to abandon the scheme he had formed. It was proper, however, to take notice of it here, in order to account for the introduction of the Law of Devises under the head of Legacies.

good as to the others; and every several devisee must make out his title in a distinct cause. Nay, so distinct and independent on each other are the several parts of the will considered with reference to these different kinds of property, that a person may affirm the will as to one, and disaffirm it as to the other; he may impeach the will *quoad* the devises, and yet insist upon taking a benefit under it *quoad* the personalty. Again, the will, as to personals, does not speak till after the testator's death; whilst, as to real estate, it refers to the date. Hence, it will pass after-gotten property of the former sort, but not of the latter.

We shall first treat of Devises, and under that head we shall consider,]

- (A) Who may devise Lands, and to whom.
- (B) Of what Estate or Interest in the Devisor he may dispose.
- (C) What Words pass a Fee in a Will.
- (D) What Words create an Estate-Tail, or for Life.
- (E) Of Terms for Years, and uncertain Interests by Devise.
- (F) Of Devises for Payment of Debts.
- (G) Of Devises by Implication.
- (H) Of the Disposition of Goods and Chattels by Will, by what Description, and to whom good.
- (I) Of Executory Devises of Lands of Inheritance: And herein of contingent Remainders, and cross Remainders, as far as they relate to this Place.
- (K) Of Executory Devises of Leases for Years: And herein of the Limitation of the Trust of a Term, as far as it relates to, and agrees with a Devise thereof.
- (L) Of void Devises: And herein,
 - 1. By devising what the Law already gives, or what the Policy of the Law will not admit.
 - 2. By Incertainty in the Description of the Thing devised.
 - 3. By Incertainty in the Description of the Person to take.
 - 4. By the Devisee's dying in the Lifetime of the Devisor.

What Circumstances are necessary by the 32 *H. 8. c. 1.* and 34 & 35 *H. 8. c. 5.* and 29 *Car. 2. c. 3.* What shall be a Revocation and a new Publication, *vid. Tit. Wills.*

(A) Who may devise Lands, and to whom.

6 Co. 16. b. THE (a) statutes of 32 H. 8. c. 1. and 34 and 35 H. 8. c. 5. give this power to all persons, except infants, idiots, feme coverts, and persons of (b) *non sane* memory; and every person may be a devisee within these statutes, except bodies politick and corporate; and these were excepted because they never answered the feudal services, and were restrained from purchasing any lands by the statute of *mortmain*.

only to persons in *extremis*, who had not time or assistance necessary to make a formal alienation, and was chiefly intended for military men, who were always supposed to be under those circumstances, and therefore the ceremonies and number of witnesses required of others were dispensed with as to soldiers, though now the rules for military testaments are allowed in most cases; but as to lands and houses, our law gave no liberty of disposing thereof by will, except in certain boroughs and places where such custom had obtained time out of mind. Show. P. Cases, 147. Sir Edward Hungerford v. Nofworthy. (b) That it is not sufficient that they be able to answer to familiar and usual questions. Cro. Jac. 497. 6 Co. 23. a.

(c) 43 Eliz. Yet, since the (c) statute of charitable uses, it has been held, c. 4. for that a devise to the principal, fellows, and scholars of *Jesús College* in *Oxford*, and their successors, for maintenance of a scholar, is good, though such devise had been *mortmain* by the statute of *wills*. Hob. 136. Flood's case. Lev. 284. S. P.

2 Vern. 104. Although a wife, by reason of the subjection she is under to her husband, cannot make a will; yet a woman, whose husband is Countess of banished for his life by act of parliament, may make a will, and Portland act in every thing as a feme sole. and Progers; for this *vide* tit. Baron and Feme.

Cro. Eliz. Also, a husband may bind himself by covenant or bond to permit his wife, by will, to dispose of legacies, &c. and this will be such an (d) appointment as the husband will be bound to perform. 27. Cro. Car. 219. 376. 597. 1 Vern. 244-5.

2 Vern. 329. 2 Vez. 141. [Where the husband stipulates, that personal property shall be enjoyed by the wife separately, it must be so enjoyed with all its incidents, and the *jus disponendi* is one of them. Fettiplace v. Gorges, 3 Br. Ch. Rep. 8. And where she has this power over the principal, she must necessarily have it also over its produce and accretions. Gore v. Knight, 2 Vern. 535. Pr. Ch. 255. S. C. Herbert v. Herbert, Pr. Ch. 44. When a feme covert is empowered to make a writing in nature of a will, a writing executed during the coverture will operate as such, Cotten v. Laver, 2 P. Wms. 624. Oke v. Heath, 1 Vez. 139. Duke of Marlborough v. Lord Godolphin, 2 Vez. 75. Southby v. Stonchouse, *id.* 612.] (d) But it does not operate as a will, neither ought it to be proved in the spiritual court; for the property passeth from him to her legatee, and it is his gift. Mod. 211. [But although it may not operate strictly as a will, but as an appointment, yet it is of a testamentary nature, and therefore must be proved in the spiritual court, else the legatee cannot entitle himself to the bequest in a court of law. And the regular course in the spiritual court is, not to give probate of the will, but administration, with the will, as a testamentary paper, annexed. Stone v. Forsyth, Dougl. 707. Ross v. Ewer, 3 Atk. 156. Jenkin v. Whitehouse, 1 Bur. 431. Cothay v. Sydenham, 2 Br. Ch. Rep. 392.] Pre. Ch. 84.—If he once assents, he cannot after dissent; and where he is bound by agreement to let her make a will, his consent shall be implied till the contrary appears; and what shall be sufficient evidence of an assent, *vide* 2 Mod. 172, 173. Eq. Caf. Abr. 56.

Roll. Abr. A feme covert executrix cannot devise any of the goods, which she hath as (e) executrix, without the (f) assent of the husband, 608. (e) Of things or his agreement after. in action,

or of what she hath as executrix by her husband's consent, she may make a will, and this is properly a will

will in law, and ought to be proved in the spiritual court. Mod. 211, 212. (f) That a feme covert executrix may make an executor without his assent, *vide* Moor, 340. 2 And. 92. Rol. Abr. 603. 912. Mod. 211, 212.

If a feme covert makes and publishes her will, and devises land by it, and her husband dies, and then she dies, the devise is void, because the consummation is founded upon the making and publishing, which are void acts. Plow. 344. 11 Mod. 157.

[It was formerly thought, that the power of a feme covert over her separate estate must be confined to such part of it as was personal; for that of her real estate she could make no disposition during her coverture, unless by fine, or unless she had, before marriage, reserved to herself such right by way of trust, or of a power over a use; that unless one of these methods were taken, her will of real estate would be void, as an instrument or conveyance, and could not bind her heirs. But the contrary hath been since adjudged; for where by articles entered into prior to the marriage of a woman who was entitled to the trust of a reversion in fee of lands, expectant on the death of her uncle, and on failure of his first and other sons, and the heirs male of their bodies, it was stipulated by the husband, that all her estate which she then had, or which at any time thereafter should descend or devolve upon her, should be conveyed to her own use, and subject to her appointment; and under these articles she executed an appointment in favour of her husband, and her children by him; it was holden, that this was a good and valid appointment as against her heir-at-law, although no conveyance of the reversion was ever executed, nor any fine thereof levied. Peacock v. Monk, 2 Vez. 191. Wright v. Lord Cadogan, 6 Br. P. C. 156. See too Doe v. Staple, 2 Term Rep. 684.]

It is said by Lord C. B. *Comyns*, that, by the custom of *London*, a feme covert may devise to her husband, but without citing any authority. Com. Dig. tit. Devise, (H. 3.)

A wife may be a devisee, though not a grantee to the husband, for as the grant had been void, because the husband and wife are but one person in law, so the devise is good, because it does not take effect till after the death of the husband, and then they are no more one person. Co. Lit. 112. Roll. Abr. 610. [This was allowed for settled law so early as the time of Ed. 2. 4 E. 2. Fitz. tit. Devise, pl. 23.]

An infant cannot devise his (a) lands; and therefore if one under the age of 21 makes his will, and thereby devises his lands, and after attains the age of 21 years, and dies without making any new publication thereof, this devise is void. Sid. 162. Herbert and Forbale, agreed per Cur. on a trial at bar.

11 Mod. 157. for this *vide* Dyer, 143. Raym. 84. 1 Vez. 299. 3 Atk. 695. (a) An infant male at the age of 15, or female at 12, if proved to be of discretion, may make a will, and dispose of personal estate. 2 Vern. 469.—Other books mention 17 or 18, at which years an infant may make his testament and constitute his executors for his goods and chattels. Co. Lit. 89. b.—But as the common law has appointed no time, and as this is a matter properly cognizable in the spiritual court, which proceeds according to the civil law, by which law a will at 14 is good; it seems agreed, that a will made by an infant at the age of 14 of his personal estate will not be controlled in Chancery, or the temporal courts. 2 Mod. 315. 2 Jon. 210. See tit. Infancy, vol. 3. 577.

If there be two jointenants of lands, and one of them devise that which belongs to him, and die, this is a void devise, and the devisee takes nothing, because the devise does not take effect till after the death of the devisor, and then the surviving jointenant takes Lit. § 287. Perk. § 500.

[(a) But it is now settled, that a subsequent severance of the jointure, whether by partition or by the death of the companion, will not effectuate a devise made during the jointure; for the statute of 34 and 35 H. 8. c. 5 § 4. requires that the devisor should have a sole estate in fee-simple, or should be seised in fee in coparcenary or in common, at the time of making the will, in order to be capable of devising. Even at common law such a will would have been bad, for before the statute a man could only devise lands which he was then seised of: and a will cannot operate as a severance of the jointure. Swift v. Roberts, 3 Burr. 1488. Butler and Baker's case, 3 Co. 30. b. Poph. 87. S. C.]

That such a devise is not good seems to be supported by the following authorities: Dyer, 303. 11 H. 6. 13. Bro. Devise, 30. Salk. 231. pl. 10. Moor, 637. 12 Mod. 278. (b) It is said by Finch, Lord Keeper, that at common law, without all question, a devise to an infant in *ventre sa mere* is good of lands devisable by custom; but the doubt arises upon the statute, which enacts that it shall be lawful for a man by will in writing to devise to any person or persons, 2 Mod. 9.—

* Posthumous children, how enabled to take a contingent remainder which hath no trust-estate to preserve it, see 10 and 11 W. 3. c. 16.

(c) As Others, (c) of as good authority, hold, that such devise is good, though the infant be not *in esse* at the death of the devisor, and that the freehold shall not be in abeyance, but shall descend to the heir at law in the mean time. Moor, 177. Lev. 135. Sid. 153. Raym. 163. Keb. 851. 2 Bullst. 273. Freem. 244.

But all agree in this, that a devise to an infant, *when he shall be born*, or when God shall give him birth, is a (d) good devise, and that the freehold shall descend to the heir at law in the mean time. Sid. 153. Snow and Cutler. Lev. 135. S. C. Raym. 162.

Freem. 244. [The universal concurrence in this point must close the question; for a devise to an infant in *ventre sa mere* necessarily implies a future disposition to take effect at its birth, as much as if the words "*when he shall be born*" were added; for surely it cannot be imagined, that the child should take the estate before it was born. Fearne's Conting. Rem. 428. And that a devise to an infant in *ventre sa mere* is good, see Taylor v. Bydall, 1 Freem. 243. Anon. Id. 293. Gulliver v. Wicket, 1 Wils. 106. Chapman v. Bislett, Ca. temp. Talb. 145. And that an infant in *ventre sa mere* is within the description of "*children living at the time of the testator's decease*," see Doe v. Clark, 2 H. Bl. 399.] (d) So of a devise to an infant in *ventre sa mere*, with a new publication of the will after his birth. Cro. Eliz. 423.

So, it is out of doubt, that if land be devised for life, the remainder to a posthumous child, that this is a good contingent remainder, because there is a person in being to take the particular estate; and if the contingent remainder vests during the continuance of the particular estate, or *eo instanti* that it determines, it is sufficient. Moor, 637. Church and Wiat. 3 Lev. 408. 4 Mod. 359. Saik. 227. Carth. 309. Reeve and Long, vide 10 and 11 W. 3. c. 16. 8 Vin. Abr. 87. pl. 12. and head of Remainder and Reversion.

A devise to an alien (*a*), so to the heir of an alien, is void, because an alien, according to the policy of our law, can have no heir, either to (*b*) inherit or take by purchase. [*(a)* The devise to an alien, it seems, would not be void; for there does not appear to be any rule of law to prevent an alien from taking by devise: the only consideration would be for whose benefit he may take. Knight v. Du Pleſſis, 2 Vez. :60. Godfrey v. Dixon, Coob. 276. Noy, :37.] Lev. 59. (*b*) A bastard may be a devisee of land though he cannot take by descent. Dyer, 323. But a monk cannot be a devisee of land. *Id. ibid.* As to religious persons who are disabled from making a will, or taking by devise, *vide* Rol. Abr. 608.

[The will of a *felo de se* (though void as to his personal estate, because that is forfeited to the king) seems to be effectual as to lands.] Plowd. 261. Swinb. 106. At Rome, suicide did

not invalidate a will, and it was common with those who were apprehensive of being exposed to capital punishment, to prevent the confiscation of their property by a voluntary death. "*Eorum qui de se statuebant, b:imabantur corpora, manebant testamenta, pretium festinandi.*" Tacit. Annal. lib. 6. § 29. But this *pretium festinandi*, this temptation to suicide was taken away by the laws of the later emperors, and the will was allowed to be good only where the party destroyed himself from impatience of pain, or derangement of mind. *Quod si futuræ pænæ metu voluntariâ morte supplicium anteverit, ratam voluntatem ejus conservari leges vetant.* Cod. l. 2. *Qui testam. fac.*

(C) Of what Estate or Interest in the Devisor he may dispose.

BY the common law, no lands or tenements were devisable, except by particular custom; neither could they be transferred from one to another but by solemn livery and seisin, or matter of record: the (*c*) true reason hereof seems to be owing to the nature of the feudal tenures; for by these, though the lord had given lands to his tenant and his heirs, which were words of limitation, and appropriated to measure out the length and continuance of the estate; yet as they were understood the heirs of the present tenant who came in by the donation of the lord, the tenant could not devise them even to his own heir, thereby to make him a purchaser, and so deprive the lord of the profits of wardship, marriage, and relief, which were incident to the feudal tenure; much less could he devise them to a stranger, who perhaps might not have ability of mind, or strength of body, though the one was requisite to assist his lord in his courts, and the other to defend his person in the field. Co. Lit. III. Abr. Eq. 174. (*c*) Because it was presumed that the testator would do that in extremis which he would not do in his health; that it proceeded from the distemper of his mind by the anguish of his disease, or by sinister persuasions, to

which he was more liable in his illness than at other times. Rol. Abr. 608.

But an estate for years might have been devised at common law; for this, as now, was only considered as a chattel, and, formerly, was of a very short duration. 50 Aff. 1. Roll. Abr. 609.

The statute of 32 H. 8. c. 1. which first introduced this disposition of lands by will, requires that the devisor should have a proper title and interest in them for that purpose; and therefore if a man devises land (*d*), in which he has nothing, and after purchases them, such a devise is void, not being within the statute of wills, for he is not a person *having* (*e*) as the statute speaks. Plow. 343. [*(d)* The law is the same whether the lands be freehold or copyhold.

Spring v. Biles, M. 24 Geo. 3. B. R. 1 Term Rep. 435. (*e*) The rule of law in this case does not depend upon the word "*having*;" but upon the will's being in nature of a conveyance; an appointment of the specifick estate. 2 Vez. jun. 427. Comp. 90.]

Salk. 237.

pl. 16.

Holt, 248.

pl. 14.

11 Mod. 129.

Fitzgib.

231. Bunter

and Cook,

adjudged in

C. B. and

affirmed in

B. R.

[In this case

of Bunter

v. Cook,

the court of

King's Bench

doubted, whether a

chattel real, acquired

after the making of

the will, would pass

by it; but that

doubt seems to have

been since done away;

for in *Wind v. Jekyll*,

P. Wms. 575. Lord

Parker held, that such

an interest would

clearly pass, and

stated the difference

between freehold

and personal inter-

ests, acquired subse-

quent to the making

of the will, to be,

"that with regard

to the real estate,

"bought after the

making of the will,

supposing that not

to pass, still there

is one in law capable

of taking it, viz. the

heir; but with regard

to the personal estate,

if the executor, though

made before the

acquiring thereof,

does not take it, it

is uncertain who

shall." (a) That

in pleading a devise,

it must be shewn

of what estate the

devisor was seised

at the time of making

the will, because

they are not at the

time of making

the will, but go

to the executor, to

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for in *Wind v. Jekyll*,

P. Wms. 575. Lord

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an interest would

clearly pass, and

stated the difference

between freehold

So, where a man devised to his wife all such sums of money, lands, tenements, and estate whatsoever, whereof at the time of his decease he should be possessed, and after the making of the will he purchased lands in gavelkind, and died without making any new publication, it was holden that those new purchased lands did not pass; for they were not *sua* at the time of making the will, and the constant form of (a) pleading is, that the testator was seised, and being so seised, &c. which at least is an evidence of the law: and there is no difference as to lands devisable by custom, or by statute. But such devise of things personal is good, though the testator had them not at the time of making his will, because they go to the executor, to whom the will is only directory.

King's Bench doubted, whether a chattel real, acquired after the making of the will, would pass by it; but that doubt seems to have been since done away; for in *Wind v. Jekyll*, P. Wms. 575. Lord Parker held, that such an interest would clearly pass, and stated the difference between freehold and personal interests, acquired subsequent to the making of the will, to be, "that with regard to the real estate, "bought after the making of the will, supposing that not to pass, still there is one in law capable of taking it, viz. the heir; but with regard to the personal estate, if the executor, though made before the acquiring thereof, does not take it, it is uncertain who shall." (a) That in pleading a devise, it must be shewn of what estate the devisor was seised at the time of making the will, *Cro. Eliz.* 530., and that he died seised of that estate. *Mod.* 217. [3 *Burr.* 1496.]

39 H. 6.

18. b.

Mod. 217.

S. P. [2*g*.

Whether this point

would not be differently

determined since the

reasoning of the court

in *Jones v. Perry*, 3*Term Rep.* 93.?] (b)

But if he re-enters,

the devise shall be

good, for he was seised

ab initio. Salk. 238.

(c) But if the father

devises lands to his

youngest son, and the

eldest son knowing

thereof enters into the

land, and disseises the

father, and so continues

till the death of the

father, by which the

will is void, yet because

it was made void by

deceit and covin, it

shall be made good in

Chancery. *Roll. Abr.*378. *per* Lord

Chancellor, in the

case of *Boswell* and*Emery*.If *A.* makes his will,

and thereby devises

lands, and is afterwards

disseised and dies (b)

before re-entry, the

devise is (c) void.

Chan. Ca.

39. Ca.

Darcy and

Beardham.

2 Chan. Ca.

144.

Prideux v.

Gibben.

[This point,

that lands

contracted

for at the

time of

making the

A. agrees with *B.* for the purchase of copyhold lands, which were surrendered out of court to the use of *A.*, but before admittance *A.* dies: *A.* was seised of other copyhold lands, and after the said contract with *B.* had made his will, and devised all his copyhold lands to *J. S.* It was ruled, that the copyhold lands agreed for, passed by the will; for after the agreement, the purchaser might, in equity, recover the land, and oblige *B.* to execute a conveyance, and till such conveyance executed, the vendor stood seised in trust for the purchaser, as he should appoint; and therefore if, after articles agreed on for a purchase, the purchaser devises the land, and dies before a conveyance executed, yet the land passeth in equity; for though according to the strict notions of law the devisor has not lands within the statute till a conveyance be executed, and he thereby become seised of them, yet after articles of purchase, the purchaser only is considered as master of the land, and therefore in (d) equity will be allowed to dispose of them.

cases. *Milner v. Mills*, *Mosel*. 123. *Allen v. Allen*, *Id.* 262. *Potter v. Potter*, 1 *Vez.* 437. *Gibson v. Lord Montfort*, *Id.* 424. Nor will it make any difference, though the day, agreed upon for the execution of the contract, be subsequent to the date of the will, *Greenhill v. Greenhill*, *Fre. Ch.* 320. if the articles were actually entered into before the making of the will, 2 *P. Wms.* 629., and they be such as a court of equity would enforce in specie. *Potter v. Potter*, 1 *Vez.* 437.] (d) That an equitable interest is as well devisable as a legal estate. 2 *Vern.* 679. adjudged. [*Potter v. Potter*, 1 *Vez.* 437.]

Abr. Eq.

175. pl. 5.

Glib. Eq.

Again, a treaty of marriage articles was entered into, whereby the sum of 700*l.* being the wife's portion, and 700*l.* more added

to

to it on the part of the husband, in all 1400*l.*, was agreed to be laid out in the purchase of lands, to be settled on the husband for life, remainder to the wife for life, remainder to trustees, to support contingent remainders, &c. the marriage took effect, the husband died without issue, and before any purchase made pursuant to the articles, having first devised all his personal estate to the defendant, who was his wife, and all his real estate to the plaintiffs, who were his nephews, and one of them his heir at law, and made his wife executrix, but taken no manner of notice of the 1400*l.* On a bill brought by the plaintiffs to have this 1400*l.* as they would have the land, if the purchase had been made pursuant to the articles, (for the wife took more by the devise than she would be entitled to under the settlement, had it been made); it was argued, that if it were to be considered as lands, she could not have both; the devise of the personal estate being more than an equivalent, and therefore a satisfaction; and it was holden by my Lord Chancellor, that, as this case is, if a purchase had been made even after making the will, though at law such lands would not pass, yet in this court there could be no question but the plaintiffs would have the benefit thereof by the relation to the articles; and though no purchase was made, yet by the agreement the 1400*l.* is to be looked upon in a court of equity as a real estate, and as such, must go to the plaintiffs.

A guardian by knight's service might have devised the ward of the body and land; so, of a guardian in (a) socage.

Abr. 609. (a) But a special guardian appointed pursuant to the statute 12 Car. 2. c. 24. cannot transfer the custody of the ward, by deed or will, to any other. Vaugh. 179.

Tenant (b) in tail to him and the heirs of his body, with reversion expectant in fee, (c) cannot devise the land in fee to another, though he dies without issue, because it is but a mere (d) possibility, and not grantable or assignable.

be good by the statute of charitable uses, by way of appointment. Duk. Charitable Uses. 110. 2 Vern. 453. (c) 31 Aff. 3. adjudged, but a *Q. rationem* added. — Whether such a reversion could be devised by parol within the custom, Styl. 409, 410, *dubitatur*. (d) But a remainder after an estate-tail may be devised. 2 Aff. 60. Bro. Devise, 42. Fitz. Assise, 259.

A man seised in fee devised his lands in trust, to sell part for payment of his debts, and till his debts were paid, to pay 100*l.* *per ann.* to his natural daughter *M.* and after the debts paid, 300*l.* for her life; and if she have children, to convey successively to those children; but if she die without issue, then to convey to the eldest son and heir of *J. S.* his nephew, and the heirs of his eldest son; but if he claim any thing during the life of *M.*, then both father and son to be excluded from having any thing out of his estate. The eldest son of *J. S.* was *A.*, who had two sisters, *B.* and *T.* *A.* died, leaving issue *J.*, who in the life of *M.* devised the lands in question to *J. S.* and died without issue, and after the death of *M.* without issue, the trustee conveyed to the sisters of *A.* and their heirs; and it was held, that this being but

a mere

Rep. 91.
Prec. Ch.
400. Will
Rep. 172.
pl. 42.
2 Eq. Abr.
353. pl. 7.
10 Mod. 39.
528.
Lingen and
Souray, de-
creed by
Lord Har-
court, and
affirmed
by Lord
Cowper.

26 E. 3. 65.
Fitz. Gard.
159. Roll.
cannot trans-
fer the custody
of the ward, by
deed or will, to
any other.
Vaugh. 179.

(b) But te-
nant in tail
may devise
to a charity,
and such
devise shall
be good by the
statute of chari-
table uses, by
way of appoint-
ment. Duk. Cha-
ritable Uses. 110.
2 Vern. 453.
(c) 31 Aff. 3.
adjudged, but a
Q. rationem added.
— Whether such
a reversion could
be devised by
parol within the
custom, Styl. 409,
410, *dubitatur*.
(d) But a remain-
der after an es-
tate-tail may
be devised. 2
Aff. 60. Bro. De-
vise, 42. Fitz. As-
sise, 259.

3 Lev. 427.
Bishop and
Fountaine,
decreed in
Chancery by
the assist-
ance of
Treby, C. J.
and Powel,
J.
[This case
of Bishop
and Foun-
taine is now
not law: It
seems to be
finally set-
tled, that a

possibility a mere possibility during the life of *M.* the devise was void, and clothed with an interest, the lands well conveyed to the sisters of *B.*
 is not only descendible, but devisable. *Selwin v. Selwin*, 2 Burr. 1131. 1 Bl. Rep. 222. 251. *Roe v. Jones*, 1 H. Bl. 30. 3 Term Rep. 88.]

Baker v. Hacking, Cro. Car. 387. 403.

[An estate that is turned to a right, as a reversion discontinued, is not within the purview of the statutes of wills. Thus *A.* being tenant in tail, the reversion to *B.*, they joined in a lease for life by deed: *B.* afterwards, during the lease for life, devised the reversion, and died, and then tenant in tail died without issue. The question was, whether this devise were good or not? and this depended upon, whether, if tenant in tail join with him in reversion in a lease for life, not warranted by the statute, so that it be a greater estate than tenant in tail can make, it be a discontinuance of the tail only, or a discontinuance of the reversion also? It was holden to work a discontinuance in both, and then the devisor having nothing more than a right in the reversion, the devise was void.]

Abr. Eq. 175, 176.
Drew and Merry, decreed.

J. S., who was to have had a considerable advantage by a will, was drawn in by fraud and false suggestions to make a composition for his interest, and to give a release; afterwards *J. S.* being sensible of the fraud, makes his will, and thereby (after other legacies) he devises all the rest of his goods and chattels whatsoever to his wife, upon condition, that she paid all his debts, and made her sole executrix; and it was held that his right to set aside the release was devisable, and the words proper for that purpose.

(C) What Words pass a Fee in a Will.

Co. Lit. 6. b.
Bulst. 222.
Bendl. 11.
Moor, 57.
wide tit.
Estates in Fee-simple.

ALTHOUGH a set form of words, and the word *heirs* particularly, are necessary in deeds to convey an inheritance, yet may they be dispensed with in last wills, at which time it is presumed that the testator is *inops concilii*. Hence great regard is paid to the intention of the testator, and such intention is to govern in all cases where it can square with the rules of law; therefore, if a man devises lands to another *in perpetuum*, or in *feodo simplici*, or *to him and his assigns for ever*, or *to him and his*, or that *such a one shall be universal heir*; in all these cases, a fee passes by the will; for it is evidently the devisor's intention that the gift should continue beyond the life of the devisee.

Roll. Abr. 234.

So, if *A.* devises land to *B.* *to give, sell, or do what he pleases with it*; these words by the intent of the devisor convey a fee to *B.* So, if the words were to *B.* or *sanguini suo*, they would pass a fee, because the blood runs through the collateral as well as lineal line.

Cro. Jac. 416.
Roll. Abr. 835.

A devise to a man and his successors carries a fee; for by the word *successors* is intended *heirs*, *quia heres succedit patri*.

If a devise be in these words, viz. *I release all my lands to A. and his heirs, A. has a fee-simple*; for where the (a) intention of conveying appears, the law dispenses with a form in a will. *shall have my inheritance, if the law allows it, or that J. S. shall be heir of my lands*, these words are sufficient to convey a fee. Hob. 2.

Bendl. 30.
(a) I appoint
that J. S.
shall have my

If lands are devised to trustees, without any words of limitation to support the trust of estates of inheritance, they, by implication, must have an estate of inheritance sufficient to support the trust, for there is no difference between a devise to a man for ever, and to a man upon trusts which may continue for ever.

Abr. Eq.
176. ad-
judged in
the case of
Shaw and
Wright,
Palc. 1.

1 Geo. 2. [Str. 798. S. C. by the name of Shaw v. Weigh, Fitzg. 7. S. C. Oates v. Cooke, 3 Burr. 1685. 1 Bl. Rep. 543. S. C. Gibson v. Lord Montfort, 1 Vez. 435. Chapman v. Blissett, Ca. temp. Talb. 145.]

If a man devises land to his wife for life, and after her death to his three daughters, equally to be divided, and if one dies before the other, then one to be heir to the other, equally to be divided; this last clause gives a fee to the daughters, for the word *heir* is *nomen operativum*, and chiefly in a will shall be taken in its full extent, and then it reaches the most remote heir.

Roll. Abr.
833.

A. devises land to his son and heir, and if he dies before his age of 21 years, and without issue of his body then living, the remainder over; he survives the 21 years, and sells the land: the sale was adjudged good, for he had a fee-simple presently, the estate-tail being to commence upon a subsequent contingency.

Sid. 148.

If A. devises land to B. for life, the remainder to C., paying several sums in gross, C. hath a fee, though all the sums together do not amount to the annual rent of the land; for the devise shall be intended for his benefit; and if he had only an estate for life, he might die before he would receive the legacies out of the land, and consequently, be a loser, which could never be the intention of the testator (b); and therefore, wherever there is a sum in gross to be paid, the devisee hath a fee, though the sum be not to the value of the land.

6 Co. 16.
Collier's
case. Cro.
Eliz. 378.
S. C. Spicer
v. Spicer.
Cro. Jac.
527. Ansley
v. Chapman,
Cro. Car.
158. Co.
Lit. 9. b.

[Wellock v. Hammond. Cro. El. 204. (b) Yet even in this case C. shall not have the fee, if a contrary intention manifestly appear. Bacon v. Hill, Cro. El. 497.]

So, if A. devises to B., in consideration that B. will release 100 l. due to him to the executors of A. B. has a fee-simple upon his release of the debt; for the devise shall be intended for his benefit, and an estate for life might be determined before he could receive 100 l. out of the land.

Bendl. 15.

If a man devises 100 l. in legacies, to be paid within a year to several persons out of land of the value of 10 l. yearly, and then devises the land to another, the devisee has a fee in the land; for though the devise be not to him, paying 100 l., yet since he must take the land subject to the charge of the legacies, he must have a fee to have any benefit by the devise.

2 Lev. 249.
2 Salk. 683.

But if A. devises lands to B., paying so much, or such sums out of the profits of the lands, the devisee takes but an estate for life; for although he takes the land charged, yet he is to pay no (c) farther than he receives, and so can be no loser.

6 Co. 16.
2 Mod. 25.
[(c) But
there is a
distinction,

it seems, between a devise to trustees to pay "out of rents and profits, and out of the annual rent: in the

the former case they have a power of selling the estate, but not in the latter. *Per* Buller, J. Doe v. Richards, 3 Term Rep. 359, 60. Eq. Ca. Abr. tit. Devises (J), pl. 7, 8.] Whether the word *paying* out of lands in general, and not mentioning any certain time, so that the loss may appear, passes a fee-simple, *Q.* and *vide* Hawker v. Buckland, 2 Vern. 106. [from which case it appears that it would not pass a fee-simple.]

Cro. Car. 158. So, if the devise had been to *B.* paying an annual sum to another, this had been an estate for life, for he may pay this out of the yearly profits without any loss to himself.

[But notwithstanding words to the effect in this and the preceding passage in the text, if there are circumstances in the will from which it can be collected, that the testator intended that the devisee should take a larger estate, such intention shall prevail. Webb v. Hearing, Cro. Jac. 415. Moore, 852. S. C. Baddely v. Leppingwell, 3 Burr. 1533. Frogmorton v. Hollyday, Id. 1618. Doe v. Woodhouse, 4 Term Rep. 89. Lee v. Withers, Sir T. Jones, 107. And so, on the other hand, where lands are charged with a gross sum, yet such charge will not carry an estate in fee without any words of limitation, if an express estate for life, or an express estate-tail is given in terms by the will. Doe v. Fyldes, Cowp. 840. Denn v. Slater, 5 Term Rep. 337.]

Goodright v. Stocker, 5 Term Rep. 13. [But a devise of a house to *A.*, “paying yearly, and every year, out of the said house, the sum of 15*s.* to *B.*,” will pass a fee.

Andrew v. Southouse, 5 Term Rep. 292. So, a devise of testator’s lands to *W.*, and all his interest in the estates of *J. C.* deceased, to *L. A.* for life, and after *L. A.*’s decease, to *E. S.*, charged with an annuity to *J. T.* for life, gives a remainder in fee to *E. S.*

Doe v. Richards, 5 Term Rep. 356. So, a devise of all the rest, residue, and remainder of the testator’s lands, hereditaments, goods, chattels, and personal estate, “his legacies and funeral expences being *therout* paid,” conveys the fee to the devisee, by reason of the words *THEREOUT paid*.

Villiers v. Villiers, Barnard. Can. 307. *A.* having a fee-simple in a light-house, and a term for 99 years in lands adjoining to it, devised to his son *H.* and his assigns, all his estate and interest in the light-house, messuages, lands, and tenements, and appurtenances thereunto belonging, upon trust, that he pay out of the rents and profits of the term, during the remainder thereof, 200*l.* *per annum*. *H.* takes a fee-simple in such parts of the premises wherein the testator had a fee, and a term in the other part.

Canning v. Canning, Mosel. 240. Where the words of a will were, “all the rest, residue, and remainder of my messuages, lands, or hereditaments, whatsoever or wheresoever unbequeathed, after my just debts, legacies, and funeral expences are fully satisfied and paid, I give to my executors, in trust for my daughters;” it was adjudged, that the executors took only an estate for life; the words “*all the rest*,” &c. comprehending the particulars only, not the estate; and the subsequent words amounting to no more than a charge in equity: that the court were not necessarily called upon to enlarge the estate to the trustees; for the trust being only for daughters, it may be understood to be only for the lives of the trustees.

Denn v. Mellor, 5 Term Rep. 558. So, where the words were, “all the rest of my lands, tenements, and hereditaments, either freehold or copyhold, whatsoever and wheresoever, and also all my goods, chattels, and personal estate, of what nature or kind soever, after payment of my just debts and funeral expences, I give, devise, and bequeath the same unto my wife *S. C.*; and I hereby nominate and appoint “her

"her my said wife sole executor of this my will," it was adjudged, that the wife took an estate for life only; for though the real estate be charged with the payment of debts and funeral expences, if the personalty be insufficient for that purpose, yet there are no words charging the estate in the hands of the wife with the payment of those debts.

might go up to the House of Lords. But the facts being the same, the court of K. B. gave judgment as here, without argument. 6 Term Rep. 175.

So, where a testator gave "all his lands, tenements, and messuages whatsoever, after debts and legacies paid, and funeral expences were discharged, to his brother-in-law," it was holden, that only an estate for life passed; for though it be true, that where a gross sum is to be paid out of lands, it gives a fee to the devisee of those lands; yet, here, the debts are not in all events charged upon the real estate, but only contingently, if the personal estate should be deficient; and therefore it does not come up to those cases where a gross sum is to be paid out of land, and consequently, gives no more than an estate for life to the devisee.]

If a man devises to his younger brother, all his lands, tenements, and hereditaments, and all his personal estate, and whatever else he hath in the world, and makes him executor, desiring him to pay his debts and legacies; the devisee hath a fee-simple by these words.

and Ackland. [Spicer v. Spicer, Cro. Ja. 527. S. P. In the case of Hopewell v. Ackland it was settled, that the word *hereditaments* will not pass a fee in a will, for that in the statute of wills it is evidently opposed to an estate of inheritance, the words of the statute being "any person having manors, lands, tenements, and *hereditaments* of estate of inheritance." See acc. Canning v. Canning, Mosel. 242. Denn v. Miller, 5 Term Rep. 558.]

son, another
ejectment
was brought,
and a special
verdict
found, in
order that
the case
of

Merson v.
Blackmore,
2 Atk. 341.

Ackland v.
Ackland,
2 Vern. 587.
Salk. 239.
pl. 18. S.C.
by the name
of Hopewell

If a man devises 50*l.* to be paid in three months, and all the rest and residue of his real and personal estate whatsoever he gives to his dearly-beloved wife, whom he makes sole executrix; by these words, the wife has a fee-simple in the lands.

So, where the testator, being seised of copyhold and freehold lands, devised all the rest of his estate, whether freehold or copyhold, to his wife and children, equally to be divided between them; it was holden, that the word *estate* must signify the interest he had in the land, and so pass a fee.

nant-right estate" pass a fee. Wilson v. Robinson, 2 Lev. 91. 1 Mod. 100. 3 Keb. 180. 245. So, all the rest of his estate. Cliffe v. Gibbons, 2 Ld. Raym. 1324.] If a man devises lands to A. for life, and after his decease, the whole remainder of these lands to B., these words pass a fee in the remainder to B. by the manifest intention of the testator. Lutw. 762.—A devise of all a man's real and personal estate passes a fee in the real estate, adjudged between the Countess of Bridgewater and Bolton, Salk. 236. pl. 15. 6 Mod. 106. S. C. adjudged, and largely debated.—[And the opinion of the court in this case of Bridgewater v. Bolton, that the word "estate" in a will *of itself* passes a fee, has been confirmed by several subsequent cases. So far indeed from its being necessary to insert words of inheritance in order to give it this operation, words of restraint must be added in order to carry a less estate; for it is *genus generalissimum*. Berry v. Edgeworth, *infra*. Ibbetson v. Beckwith, Ca. temp. Talb. 157. Tanner v. Morfe, *Id.* 283. 3 P. Wms. 295. S. C. by the name of Tanner v. Wife. Tuffnell v. Page, Barnard. 9. 2 Atk. 57. Ridout v. Pain, 3 Atk. 486. 1 Vez. 11. S. C. Baillis v. Gale, 2 Vez. 48. Scott v. Alberry, Com. Rep. 337. Macsree v. Tail, Ambl. 181. Stiles v. Walsford, 2 Bl. Rep. 938. Hurst v. Earl of Winchelsea, 2 Burr. 879. Holdfast v. Marten, 1 Term Rep. 411. Fletcher v. Smiton, 2 Term Rep. 656. Doe v. Chapman, 1 H. Bl. 223. And the word "estates" is equivalent to "estate." Fletcher v. Smiton, 2 Term Rep. 656. Tilley v. Simpson, *Id.* 659. n. Under a sweeping clause of "all the remainder and residue of the testator's effects, both real and personal," a fee in lands will pass.

2 Vern. 564.
Murray and
Wyse. Pre.
Ch. 264.

4 Mod. 89.
Show. 348.
S. C. Eq.
Abr. : 77.
pl. 16.
[The words
"all my te-

Hogan

Hogan v. Jackson, Cowp. 299. So, a devise of "all I am worth" will carry a fee. Huxtep v. Brooman, 1 Br. Ch. Rep. 437.

Abr. Eq.
178. Barry
and Edg-
worth.
Pach. 1729,
decreed at
the Rolls.
2 P. Wms.
524. S. C.

A., a young lady, who was in eight days time to be married to the defendant, being taken ill, made her will, and after several specifick and pecuniary legacies, devises in these words: *Item, I give and bequeath all my land and estate in Upper Catesby in Northamptonshire, with all their appurtenances, to William Edgworth of St. Margaret's, Esq.* and made him and Mrs. Rudge executors and residuary legatees, and died seised of a real estate of the value of 200*l.* per ann. and possessed of about 3000*l.* personal estate, leaving the plaintiff's wife, who was her sister and heir. The only question was, whether the defendant had an estate in fee, or only for life? It was agreed, that a devise of all his estate would have passed a fee; but a difference was endeavoured between such a devise of all his estate generally, and a devise of all his estate at such a place, that this was only a description of the place where the estate lay, and no devise of the interest which he had in that estate, farther than for life; and it was agreed clearly, that a devise of all his lands would pass only an estate for life, and not the estate in fee which he had in those lands. But the master of the *Rolls* was clearly of opinion that he had an estate in fee, because the lands passed by the first words, and the interest in those lands by the second; and if the word *estate* meant nothing more than the lands, it would be useless: but if the devise had been of all his lands or estate at such a place (*a*), he thought that would not have passed the fee, but would have been taken according to the common acceptance for his lands at such a place; but as this was, it must be a fee, and decreed accordingly.

[(a) Lord C. Talbot said, he remembered this case very well, and that no such distinction as this was made in it. Ca. temp. Talb. 160. See 1 Vez. 226.]

Cro. Car.
447. Wil-
kinson and
Merryland.
Roll. Abr.
§34.
Jones, 380.

But where a man seised of Black Acre in fee by mortgage, which was forfeited, and of White Acre, as his own inheritance, devised White Acre to his brother, and then devised all the residue of his goods, leases, mortgages, estates, debts, ready money, and other goods, whereof he was possessed, after debts and legacies paid, to his wife, and made her executrix, and died; it was holden, that this was no devise in fee to the wife, of the mortgaged land; for the word *estate* is coupled here with chattels, which shew that he meant only estates for years, and the rather, because the words *whereof he was possessed* shew, that he intended only to give her chattels, and the mortgage-money, and not the inheritance of the land.

Timewell v.
Perkins,
2 Atk. 102.
Dally v.
King, 1 H.
Bl. 2. S. P.
Semb.
However,
where a
testator has
already
mentioned
both real
and personal
property, a devise

[So, where a devise was in these words, "All those my freehold lands and hop-grounds, with the messuages or tenements, barns, &c. now in the tenure or occupation of the widow L., and all other the rest, residue, and remainder of my estate, consisting in ready money, plate, jewels, leases, judgments, mortgages, &c. or in any other thing whatsoever or wheresoever, I give unto A. H. and her assigns for ever;" Lord Hardwicke held, that the word *estate* in this clause would not pass the residue of the real estate, for that being coupled with things that are personal, it must be restrained to personals.

property, a devise "of all the rest and residue of his estate, of what nature or kind soever," will include real

real as well as personal estate, though accompanied with limitations peculiarly applicable, and usually applied to the latter only. *Doe v. Chapman*, 1 H. Bl. 223.

A testator wills that his lands shall go to his two younger brothers *R.* and *M.*, to be divided between them; and if *R.* should have no issue male, then his whole lands and estate shall go to *M.* in tail male, he paying 200 *l.* to the daughters of *R.* after the same estate shall fall to him; and if *M.* shall have no issue male, then his lands shall go to his nephew *T.* and his heirs, he paying 200 *l.* to the daughters of *R.* and *M.* respectively after the estate shall fall to him; and if *T.* have no issue male, then "*his said estate*" shall go to the daughters of *R.* and *M.*; and if they have none, then to the daughters of *T.*, and if he have none, then to the testator's heirs. An estate for life only passes to the daughters of *R.* and *M.*, the word "*estate*" being here descriptive only.

Rogers v. Briggs,
Andr. 210.

By this devise, viz. "I give and demise to *A.*, her heirs and assigns for ever, all my lands at *B.*, and I give and bequeath to *A.* aforesaid all my lands at *C.*" *A.* only takes an estate for life in the lands at *C.*, and the reversion descends, although the will begin with these introductory words, "For those worldly goods and estates wherewith it hath pleased God to bless me," and contain a legacy of 1 *s.* to the heir at law.

Right v. Sidebotham,
Dougl. 759.

So, though a will begin with like introductory words, and then the testator gives all his freehold tenement lying in *G.* to *A.*, *B.*, and *C.*, "*to them my sister's sons*," and then, among several pecuniary legacies, leaves 10 *s.* to his heir at law, *A.*, *B.*, and *C.* take only for life, and the reversion descends.

Denn v. Galken,
Cowp. 657.

So, where there are similar introductory words, and the testator gives his house to a younger son *S.*, and after the death of *S.* to *A.* and *B.*, sons of *S.*, and a legacy of one shilling to the husband of his heir at law, *A.* and *B.* take only for life, and the reversion descends.

Right v. Russell,
Scac. Hil.
1 Geo. 3.
cited in
Dougl. 761.

So, if, after a similar introduction, the testator gives all his real estate to his wife for life, and to his son *P.* after his wife's death, all his land at *W.*, and, among several legacies, 5 *s.* each to all his grandchildren, among whom was his heir at law, *P.* shall only take the land at *W.* for life, and the reversion shall descend.

Roe v. Bolton, 2 Bl.
Rep. 1045.
and Dougl.
761.

So, if after the like words in the preamble, the testator gives to *W. W.* his nephew two houses at *S.*, with a croft and appurtenances belonging to them, now in the occupation of *A.* and *B.*, and further directs that the said houses should not be entered upon by the devisee till after the decease of his executor, *W. W.* takes only an estate for life.

Frogmorton v. Wright,
3 Will. 414.

And yet introductory words to this effect are material in the construction of subsequent devises.

Ibbetson v. Beckwith,
Ca. temp.

Talb. 160. *Maudy v. Maudy*, Ca. temp. Hardw. 143. *Goodright v. Stocker*, 5 Term Rep. 13. *Gulliver v. Poyntz*, 3 Will. 141. *Hogan v. Jackson*, Cowp. 306.

One devises thus, "*As touching my worldly estate*, I devise the same as follows: I give to my wife *E. M.* 5 *l.* to be paid yearly out of my estate at *G.*, and also one part of the dwelling-house,

Loveacres v. Blight,
Cowp. 352.

" house, with as much wood-croft home at her as she shall have
 " need of, by her executors hereafter named. *Item*, to my son *T. M.*
 " and daughter *E.* 5*l.* each, to be paid twelve months after my
 " decease. *Item*, to my sons *T. M.* and *R. M.*, whom I make
 " my — and ordain my sole executors, all my lands and tene-
 " ments, freely to be enjoyed and possessed alike." *T. M.* and
R. M. are tenants in common, and take a fee.

Grayson v.
 Atkinson,
 1 Will. 333.

So, where after introductory words to that effect, a testator gave several legacies to *A.*, and directed him to sell all or any part of his real or personal estate for the payment of his debts and legacies, and desired three persons to assist him in the sale thereof, and to be supervisors of his will; and after giving some pecuniary legacies to others, concluded with this residuary devise: " As to all
 " the rest of my goods and chattels, real and personal, moveable
 " and immoveable, as houses, gardens, tenements, my share in the
 " copperas works, &c. I give to the said *A.*"; It was holden that a fee passed to *A.*

Smith v.
 Coffin, 2 H.
 Bl. 444.

So, where a testator reciting, " As to such worldly estate as
 " God has pleased to bless me with," made a provision for his heir at law, and devised " all the rest and residue of his goods
 " and chattels, rights, credits, personal and testamentary estate
 " whatsoever to *B.*, for his own use, benefit, and disposal," it was holden, that *B.* took an estate in fee in the lands of the testator, for the residuary clause is commensurate with the introductory clause.]

Cro. Car.
 129. Cham-
 berlain and
 Turner.
 Jon. 195.
 Dyer, 357.
 in margine.

(a) *A.* de-
 vises in these
 words: " I
 " give, rati-

" fy, and confirm all my estate, right, title, and interest which I now have, and all the term or terms of
 " years which I now have, or may have in my power to dispose of, after my death, in whatever I hold by
 " lease from *J. P.*, and also the house called the *Bell Tavern*, to *B.*" it was holden by three judges
 against Holt, that the devisee took an estate in fee in the *Bell Tavern*. Salk. 234. 3 Will. 419.

(D) What Words create an Estate-Tail, or for Life.

Bro. tit.
 Devise, 1.
 Co. Lit.
 9. b.
 25. a. 27. a.
 Hob. 33.
 Vent. 228.

AND here the former rule will hold good, that the intent of the
 A devisor will supply the want of those words which are ne-
 cessary in a conveyance at common law; and therefore (b), if *A.*
 devises land to *B.* and his heirs male, the law will supply these
 words, *of his body*, and make it an estate-tail.

229. vide head of Estates-tail. (b) But a devise cannot direct an inheritance to descend against the
 rules of law; and therefore in this case, if *B.* hath issue a daughter, who hath issue a son, he shall never
 inherit; for the rule is, that whoever claims as heir in tail-male, must convey his descent wholly by
 heirs male. Roll. Abr. 835. Vent. 228. vide tit. Descent.

2 Vern. 766.
 Abr. Eq.
 179.

So, a devise to one and *semini suo* creates an estate-tail: so, if
 lands are devised to one, and if he die before issue, or if he depart,

not leaving (a) issue, or if he die, not having a (b) son, all these limitations create an estate-tail. (a) And if it shall please God to take my son R. before he shall have issue of his body, so that the lands descend to his brother, this is an estate-tail. Owen, 29. adjudged. (b) For the word son is *nomen collectivum*. Vent. 231.

But if a man devises lands to another without more words, this is but an estate for life; and if the devise had gone farther, *viz. to him and his assigns*, these words, of themselves, had not enlarged the estate; but if it had been to him and his assigns for ever, it had been a fee. Co. Lit. 9. b. 1. to. tit. Devise, 33. Roll. Abr. 834.

If A. devises lands to his eldest son J. S. and the heirs male of his body for the term of 500 years; provided if he, or any of his issue male, alien the premises, then to remain over, this is an estate-tail, and the limitation for 500 years void; for though generally a devise to a man and the heirs of his body, for 1000 years, is a term, and not an inheritance; yet, here, the testator's intent was, that it should be an inheritance, because by the proviso he took care to advance the issue of J. S., but if it should be a term, then by the descent of the inheritance on J. S., the term would be merged, and the issues would be unprovided, for J. S. might alien the estate. 10 Co. 78. Moor, 772. S. C.

A. seised in fee of a house and lands belonging to it, devises the moiety of the house to his wife for life; *item*, he devises the other moiety of the house to his second son; *item*, he devises the said house, and all the lands belonging to it, to his second son; yet the son took but an estate for life; for the second devise to the son had its effect by conveying that moiety of the house, and the land which he had not by the first devise, and there are no words in the will to create a larger estate. Roll. Abr. 834.

A. having issue two sons, devises Black Acre to the eldest, and White Acre to the youngest; and if either of them died, his acre should go to the survivor, and farther devised (having two daughters) to each of them *ior.* it was adjudged the sons took but an estate for life; for though the consideration generally gives a fee, yet where there are express words to determine the intent of the devisor, (which is always the rule in wills) there, the devise shall be (c) construed accordingly; and here, it is provided, that, after the death of either of them, the survivor should have both acres, which declares his intent, that they should have it but for life, notwithstanding the sums appointed to be paid to the daughters. Cro. Eliz. 498. (c) If lands are devised to A. and B. equally to be divided, they have but estates for life, for this can mean no more than that they should severally occupy the land. Roll. Abr. 834.

If A. devises land to his son B., and if he hath issue male of his body lawfully begotten, then that issue to have it, and if he hath no issue male, then to others in remainder; by this devise B. hath an estate-tail; for where the devisor saith, if he have no issue of his body, then it shall remain over, that is as much as if he had said, if B. dies without issue male, which had been sufficient to create an estate-tail in him. 9 Co. 128. Owen, 29. Vent. 227. Pollex. 487.

A. having two sons, B. and C., devised *Black Acre* to B. and his heirs, and *White Acre* to C. and his heirs, and farther willed that

and Cowley. Pollex. 487. See Sid. 148. the survivor of them should be heir to the other, if either of them died without issue: though the first words are sufficient to pass an estate in fee, yet the subsequent words correct them, and pass only an estate-tail, and the remainder in fee is not contingent, but executed, each son being tenant in tail of the part to him devised, with the remainder to the survivor in fee.

Cro. Jac. 448. King and Rumball. Roll. Abr. 836. Pollex. 487. A man devised all his free lands to his wife for life, and after her death to *A.*, *B.*, and *C.*, his three daughters, equally to be divided; and if any of them die before the other, then the others to be her heirs, equally to be divided; and if they die without issue, then to others named in the will: adjudged, that the daughters had an estate-tail.

Noy, 64. Dyer, 330. Roll. Abr. 835. (a) Where a man devised land to *A.* his son for ever, and after his decease the remainder to his heir male for ever, with other remainders over, it was holden an estate-tail in *A.*; for though the first devise, being to him for ever, would give him a fee-simple, yet the subsequent words to his heir male, shew what sort of inheritance the deviser intended him. Bullst. 219 to 223. Whiting and Welkins. Roll. Abr. 836.

So, where the devise was to a man and his heirs, and if he die without issue, that then the land should go to *A.* and *B.* or the survivor of them; adjudged an estate-tail in the first devisee; for in these cases, the (a) extent of the word *heirs* is confined to the descendants or issue of the body of the devisee, since otherwise the limitation over cannot vest according to the intent of the deviser, for even in wills they will not allow a limitation of a fee upon a fee.

Roll. Abr. 237. If a man devises land to his wife for her life, and after to her son, and if he dies without issue having no son, that then *J. S.* shall have it; the son by this devise takes an estate in tail male, for though the devise to the son, and if he dies without issue, had been a good tail general, yet when the deviser went further and said, having no son, he thereby explained what issue he intended should inherit the land, and limited it to the issue male.

Cro. Car. 185. Spalding's case. Bullst. 230. S. C. Vent. 230. 3 Lev. 434. S. P. 1 P. Wms. 427. S. P. 2 P. Wms. 196. S. P. Ld. Raym. 524. S. P. *A.*, having issue *B.* and *C.*, devised some of his lands to *B.* his eldest son, and the heirs of his body, after the death of his wife, and if *B.* died, living his wife, then to *C.* his son; and devised other lands to *C.* his son and the heirs of his body, and if he died without issue, then to remain over; *B.* died in the life of the wife, yet adjudged that *C.* could not enter into the land, while any issue of *B.* remained; for the words, *if B. died living the wife*, did not abridge the estate-tail which was given by the former words, because the testator could not be supposed to intend to prefer a younger son before the issue of his eldest, especially, when he had in the former part of the will settled it on the issue of the eldest, and made the same provision of other lands the same way for the youngest son.

3 Lev. 125. Luxford and Check. Raym. 427. S. C. by the name of Brown v. Carter. *A.* seised of lands devised them to his wife, if she did not marry, but if she should marry, then his eldest son presently after her marriage to enter, and hold the land to him and the heirs male of his body, the remainder to his other sons in tail male; the wife did not marry; yet the court resolved that the lands were entailed by the will, taking the intent of the deviser to be, that the entail should

should be created in all events, but that the eldest son should not enter till after the decease of the wife, unless in case of her marriage, and then to enter presently.

Cutler. [Note, Raymond has reported merely his own argument.]

2 Show. 152.
pl. 134. S.C.
by the name
of Brown v.
of Brown v.

A man had issue, *A.*, *B.*, and *C.*, and having three houses, devised them all to his wife, with remainder of one house to each child, and his heir, and if any of his said issue die without issue of his body, the survivors to have *totam illam partem* between them, equally to be divided: these last words carry only an estate for life in the house of him that first dies to the survivors, for they imply no more than that the whole part of him that dies first shall go to the survivors, and there being no estate limited it can be only for life.

3 Leon. 129.
194.
3 Leon. 180.
Cro. Eliz.
53. Hawk-
ins's case.
Q. & vide
supra.

A. devised all his lands to his wife till his son should be of the age of 24 years, and then to his heir and to his heirs for ever, and when he comes to the age of 24 years, that she shall have the third part for her life, and if he dies before the age of 24 years, then she to have it all for life; and after her decease, if the heir has no issue, the remainder to *B.*, the remainder to the right heirs of the devisor; the heir came to the age of 24 years; but no entail was created by the will, for the fee-simple descended to him, and the limitations were to take place if he died before the age of 24 years, which he did not.

Dyer, 124.
Roll. Abr.
839.

A. devised lands to *B.* his son, and if *C.* his daughter survived *B.* and his heirs, then she should have the lands: it was adjudged, that *B.* had but an estate-tail, for the word *heirs* must be intended heirs of his body, for he could not die without (*a*) collateral heirs while his sister was alive. But if the will had said, that if *J. S.* a stranger survives *B.* and his heirs, then he should have the lands; there, *B.* would have had a fee-simple, and then the intended remainder over must be void, for it is to vest on a contingency of *B.*'s dying without heirs, which is too (*b*) distant to expect.

Roll. Abr.
826. Cro.
Eliz. 525.
Cro. Jac.
415, 416.
448. Bull.
193. Cro.
Car. 41.
2 Lev. 162.
(a) Salk.
233. pl. 12.
Ld. Raym.
568. 1 P.
Wms. 23.

pl. 5. Comyns, 52. pl. 51. [2 Eq. Ca. Abr. 305. pl. 2. Ca. temp. Talb. 1. Dougl. 254. Ambler 363. 3 Term Rep. 488. n. 491. 1 Vez. 89. 3 Atk. 617.] S. P. adjudged. (*b*) *Vide* Vaugh. 272, 271.

So, where *A.* devised to *B.* for his life, and to his heirs, and for want of heirs of him, to *C.* in the same manner, and for want of heirs of him, to *D.* and his heirs for ever, and the jury found that *B.* and *C.* were brothers, and that *D.* was next cousin and heir to them, though not mentioned in the will; the court held, that they had but an estate-tail, and the remainder in fee to *D.* was good, for *D.* being cousin and heir to them, proves that he intended heirs of the body: (*c*) also, want of heirs of him, are to be taken for want of heirs of his body.

3 Lev. 70.
Parker and
Thacker,
adjudged.
[Morgan v.
Griffiths,
Cowp. 234.
S. P.]

[So, where *A.* devised lands to his son for life, then to his son *A.* for life, remainder to his son *G.*, and his heirs for ever, and if he should die *without heirs*, then to his two daughters; this was determined to be an estate-tail in *G.*; for it was impossible he

(c) 7 Co. 4.
S. P.
Ca. temp.
Talb. 1.
Tyte v.
Willk.

should die without heirs whilst his sisters were living; consequently, the testator by *heirs*, could only mean *heirs of the body*.

1 P. Wms.
27. Nottingham v.
Jennings.

The rule holds the same where the remainder is limited to the heirs of the testator himself, if such heirs must also be heirs to the first devisee. As, where *A.* devised to his second son and his heirs for ever; and for want of such heirs then to the testator's right heirs; here, though the devise to the testator's heirs was a mere nullity, as such heirs must be in by descent, yet it was held sufficient to manifest the intent, and aid the construction of an estate-tail.

Attorney
General v.
Gill. 2 P.
Wms. 369.

But where there was a devise to one and his heirs, and if he die without heirs, then to a *charity*; lord chancellor said, the devise being to one and his heirs, and if he die without heirs, then over, such devise over was void, and the word heirs should not be construed to signify heirs of the body, where the devisee over is not inheritable.

1 Vez. 89.
Tilburgh v.
Barbut.
3 Atk. 617.

So, where the testator devised to his son *and his heirs*, and if he die *without heirs*, remainder over to another who was half brother to the first devisee; upon a question made, whether the first limitation was in fee or in tail? Lord *Hardwicke* said, it was a plain case, and one of those points which the court would not suffer to be argued, as having been determined before. This was a devise over to a stranger, as the law considers him, and who could not in any event inherit as heir to his brother.]

Robinson's
case, 1 Roll.
Abr. 837.
pl. 12.

If *A.* devises lands to *B.* for life, and if he die without issue, then to remain to *C.*, this is an estate-tail in *B.*, for it is not to (*a*) remain to *C.*, till the issue of *B.* be spent.

2 Brownl. 271. Moor, 682. Lit. Rep. 259. 1 P. Wms. 57. 1 Vent. 230. S. C. cited. (*a*) And therefore, wherever the ancestor takes an estate for life, and there is a limitation to his heirs or issue, these words shall be words of limitation, and not of purchase, and vest the inheritance in the ancestor; laid down as a rule in *Shelly's case*, Co. 99. But on this rule of creating by implication an estate of inheritance in the ancestor, there have been several nice distinctions, as appears by the cases on this head.

Vent. 230.
Burley's
case, cited
by Hale, C. J.
to have been
adjudged
43 Eliz. but
Q. Whether there be any such case on the roll?

So, of a demise to *B.* for life, the remainder to the next heir male, and for default of such heir male, the remainder over; this is a good estate-tail, for the words *heir* and *issue* are *nomina collectiva*, and carry the land not only to the immediate heir or issue, but to all that descend from the devisee.

2 Co. 66.
Archer's
case.
2 Anderf. 37.

But if lands are devised to *A.* for life, the remainder to his first heir male, and the heirs male of the body of such heir male; the devisee hath but an estate for life, by the express words of the will; and the limitation of the remainder to the heir male, and to the heirs male of such heir male, is a good contingent remainder in the heir male, because it may vest *eo instanti* that the particular estate determines.

6 Co. 16. b.
Wylde's case.
Moor, 397.
S. C. Cro.
Eliz. 743.
S. C.
Vent. 229.

Lands were devised to *A.* and his wife, and after their decease to their children, they having then a son and a daughter; it was adjudged, that *A.* and his wife had but an estate for life, the remainder to the children for life; for no greater estate had passed at common law; and the intent of the deviser must plainly appear,

or they will never admit of a construction different from what they would allow in conveyances executed in the life of the party; and for that reason, if the devise had been to *A.*, and his children, or issue, *A.* having children at the time, *A.* and the children would have been jointenants for life.

10 Mod.
376. S. C.
cited.

But if *A.* had devised land to *B.* and his children or issue, and *B.* had none at the time of the devise, then he takes an estate-tail, for it is plainly the intent of the deviser, that the children shall have the land; and they cannot take as immediate devisees, for they were not *in esse*; nor by way of remainder, for the devise was immediately to *B.* and his children; and therefore, the words shall be taken as words of limitation, *viz.* as children of his body.

6 Co. 17.
Vent. 229.
2 Lev. 59.
60.

One having two sons, *A.* and *B.*, by his will in writing devises lands to his son *A.* for his natural life, and after his decease he gives the same to the issue of his body lawfully begotten on a second wife, (he having a first then living,) and for want of such to *B.* and his heirs for ever, with power to *A.* to make a jointure to such second wife for her life, and dies; *A.*, in the life of his first wife, suffers a recovery to the use of himself in fee, and dies without issue; and the question was, whether by this devise *A.* was tenant in tail, for then by the recovery the remainder was destroyed; or if he was only tenant for life, for then this recovery was a forfeiture of his estate: and it was adjudged in *B. R.* against the opinion of *Hale*, Ch. Just., that *A.* had but an estate for life; but this judgment was reversed in the *Exchequer-chamber*, where it was adjudged, that *A.* had an estate-tail.

King v.
Melling,
Vent. 214.
225. &c.
2 Lev. 58.
3 Keb. 42.
52.
Pollex. 101.
Fitzgib. 23.
S. C. cited.
8 Mod. 263.
384. S. C.
cited. 2 P.
Wms. 472.
S. C. cited.
As this
seems to be
the most
ruling and

established case relating to this doctrine, it may not be improper briefly to insert the reasons of the resolution, which are these: 1. Because that issue is *nomen collectivum*, and is a stronger word than *children*, which takes in only the immediate descendants of the parent; but issue takes in all from generation to generation; and so long as there is any issue of *A.* the remainder is not to take place. 2. In acts of parliament, issue is as comprehensive as heirs of the body; as in *Wells*. 2. *de doms*, it is said, *quo minus ad exitum descendat*, which takes in all issues in *secula seculorum*. 3. He had no issue at this time, for then it would, as this case is, vest in them by way of remainder; but having none, leaves it to the construction of law, upon the import of the word *issue*. 4. It is issue of his body begotten, which is an eye of an estate-tail. 5. It is said, "*and for want of such issue*," which is a phrase agreeable to an estate-tail. 6. It is in case of the creation of an estate-tail, where *voluntas donatoris* has some influence. 7. It is in case of a will, where the intention of the testator is to govern.

[A testator gave and bequeathed to his grandson *S.* all that his meadow, &c. to hold unto *S.* and the heirs of his body lawfully begotten, *and their heirs for ever*, chargeable nevertheless, and charged with the payment of eight pounds a year unto *M.* during her natural life: but in case *S.* should die without leaving issue of his body, then he gave and devised the same to *G.*, to hold to him and his heirs for ever; chargeable as aforesaid, and also chargeable with and subject to the payment of 100 *l.*, unto his the testator's niece, within one year after *G.* or his heirs should be possessed of the same premises. *S.* entered and died seized, leaving issue a son, who also died seized, having previous to his death, made his will, and devised the same to his mother, and her heirs and assigns. And the question was, what estate *S.* took under this will? And it was contended, on behalf of the mother, that the son of *S.* took a fee-simple, the words "*heirs of the body*" operating as words of purchase to answer the intent; and it was said that a

Denn v.
Shenton,
Cowp. 410.

strong circumstance was, the legacy of 100*l.* devised to the testator's niece, in case *S.* should *die without issue*; of necessity therefore the testator must mean a dying without issue, at the time of his death; for if he intended she should wait till a *total failure of issue*, she might wait for 100 years, or for ever. But Lord Mansfield said the distinction was, between a devise of lands and personal estate: in the latter case, the words were taken in their vulgar sense; that was, *dying without leaving issue at the time of his death*. The question was, whether the grandson took an estate-tail or an estate in fee? The devise was to *S.* and the *heirs of his body*, and *their heirs for ever*, but the words "*their heirs for ever*" were qualified by the subsequent words "*in case he shall die without leaving issue*," which clearly shewed it an estate-tail; and then the testator gave it over to the mother. It was too clear to admit of a doubt. And the other three judges concurred.]

Fountain
and Gooch,
Hil. 29 &
30 Car. 2.
Rot. 1247.
[S. C. cited
by Lord
Mansfield
in Cowp.
380.]

Upon a special verdict, the case was; *Richard Gooch*, seised in fee of lands in *Suffolk*, by will in writing devises to *Richard*, son of his late brother, all his lands commonly called *P.* and also all other his lands during his natural life, and to the heirs male of his body begotten; and for want of such issue, he the said *Richard* to have the said estate but during his natural life, and no longer; and then, his will was, that the aforesaid estate should descend to *Philip* his nephew: *Richard* suffers a common recovery to the use of himself and his heir, and devises this land to the defendant in fee, and dies without issue male. It was adjudged to be an estate-tail in *Richard*, and so the remainder barred by the recovery, and not an estate for life, and so forfeited by the recovery; for the words *and for want of such issue, he the said Richard to have but an estate during his natural life*, are no more than the law implies; for if tenant in tail has no issue, it resolves into an estate for life, and so it was adjudged. The objection was, that it should be construed thus: I give the land to *Richard* during his life, and no longer, in case he has no issue male of his body; and so an estate-tail upon a contingent; and he dying without issue male, it is now become but an estate for life *ab initio*; but the judgment was *ut supra*.

Driver v.
Edgar,
Cowp. 379.

[A testator devised lands to his daughter *E.* to hold the same, after the death of the testator's wife, to his said daughter and *the heirs of her body* lawfully begotten; and to his daughter *M.* other lands, to hold from and after his wife's decease, to the said *M.* and to the heirs of her body lawfully begotten; and declared his further mind and will to be, that in case either of his said daughters should happen to die single, married, or widow, without leaving children or child *living at their decease*, lawfully begotten, then the estate given her by his will, should be void as to the inheritance of heirs, and of none effect, and the lands so given her should go to his heir male, and his heirs male, he and they paying to the surviving daughter an annuity during her life. *E.*, after the decease of her mother, suffered a common recovery of the lands so devised to her, and afterwards devised them, and died unmarried. Upon a question, whether the recovery had barred the remainder over; it being contended on behalf of the claimant in remainder, that

that upon the whole of the will the intention of the testator was not to give his daughter an immediate estate-tail, but an estate for *life* only, with remainder to her children in tail, if she left any, and if not, then to the testator's heir male, &c.; but if not so, still, that in providing for the event that had happened, he expressly revoked the estate of inheritance; the court said, the validity of the recovery depended on the point, whether the daughter was tenant in tail, or tenant for life only; and that it was necessary for the plaintiff to support the proposition, that, at the death of the testator, *E.* was, during her own life, tenant for life only; that the estate was given *to her and the heirs of her body*, which was an estate-tail; that if she was tenant in tail to the hour of her death, nothing was so clear, as that all conditions limited upon such estate-tail, were avoided by the common recovery, which had been suffered. And the court were of opinion, that she was tenant in tail.]

A copyholder in fee surrenders to the use of his will, and by will devises his copyhold lands to his wife, and if she hath issue by the devisor, that issue shall have it at his age of 21 years; and if the issue die before that age, or before his wife, *or if she hath no issue*, then she shall choose two attornies, and she to make a bill of sale of my lands to her best advantage. *Per curiam*, she hath only an estate for life; and having no issue, hath no interest to dispose, but an authority only to nominate two, who shall sell, and the vendee shall be in by the will.

Cro. Jac.
199. Beal
and Shep-
hard, ad-
judged.
4 Mod. 318,
519. S. C.
cited.

One by will devises lands to *A.* for life, without impeachment of waste; and in case he shall have issue male, to such issue male and his heirs for ever; and after the death of *A.*, in case he shall leave no issue male, to *B.* and his heirs for ever, and dies: *A.* suffers a recovery, and declares the use to himself in fee, and by his will devises it to *C.* in fee, and dies without issue; and the first question was, whether by this devise *A.* took an estate in tail male, or only for life? and it was held to be but an estate for life in *A.* 1st, Because it was devised to him expressly for life, and that without impeachment of waste, which would have been needless, if it were an estate-tail. 2^{dly}, The words, *and in case A. die without issue male, or leave no issue*, are not to be taken substantively and absolutely, but relatively to what was said before, *viz.*, if *A.* die without issue, who shall take the fee as before is appointed; and these oblique words cannot be intended to destroy by implication the estate expressly devised before to the issue male of *A.*, and there is no uncertainty in these words, *to the issue male*, which of them shall take, if there be several, for the eldest shall take the fee by purchase, &c.

3 Lev. 431.
Ld. Raym.
203. S. C.
cited in
8 Mod. 256.
See Fitz-
gib. 21.
10 Mod.
403. be-
tween Lod-
dington and
Kime; and
the court
being ready
to give judg-
ment on this
point, J.
Powell jun.
started ano-
ther, *viz.*
Whether
these re-
mainders
could take
place as
executory

devises, or contingent remainders? upon which it was twice argued; but before any judgment the parties agreed; but in *Salk.* 224. pl. 1. S. C. it is said to have been further held, that this limitation to the issue was not an executory devise, being after a freehold, but a contingent remainder, so that a posthumous son could never take; but there is no judgment; but *per Raym. Ch. Just.* in the case of *Sparrow* and *Weigh* it was determined, and judgment entered, *Pasch. 9 W. 3.* that it was only an estate for life; and it was likewise decided in the same manner in *Chancery*, and on an appeal to the House of Lords. *Abr. Eq. 183.* [And see acc. *Doe v. Reafon*, 3 *Willf.* 244.]

White v.
Collins,
Com. Rep.
289.

[A testator devised lands to his son *F.* to enjoy the rents and profits thereof during the term of his natural life, with power to make a jointure of all or part, and after his death and jointure, if any were made, *to the heirs male of his body lawfully begotten, during the term of his natural life, and for want of such heir male*, he gave the same lands to another son. It was adjudged, that *F.* took only an estate for life.

Law v.
Davis,
2 Ld. Raym.
1567.

Again, where a devise was to *B.* and his heirs lawfully to be begotten, *that is to say, to his first, second, third, and every son and sons successively, lawfully to be begotten of the body of the said B. and the heirs of the body of such first, second, third, and every other son and sons successively*, lawfully issuing as they should be *in seniority of age and priority of birth*, the eldest always, and the heirs of his body to be preferred before the youngest, and the heirs of his body, remainder over; it was adjudged, that *B.* took only an estate for life; for that the subsequent clause was not *contrary* to the preceding general limitation to *B.*'s heirs lawfully to be begotten, but explanatory of what heirs, &c. were meant.

Doe v.
Laming,
2 Burr.
1100. 1 Bl.
Rep. 265.

Gavelkind lands were devised to *A.* and the heirs of her body lawfully begotten or to be begotten, as well females as males, and to their heirs and assigns for ever, to be divided equally, share and share alike, as tenants in common, and not as jointenants. It was holden, that the words *heirs of her body* did not operate as words of limitation, nor, consequently, create an estate-tail in *A.* For here, these words did not stand independent and unqualified, but were corrected and explained, very expressly, by the words which followed and were coupled with them; the words *as well females as males*, annexed to the words *heirs of the body*, were incompatible with and expressly broke the descent, because gavelkind lands cannot descend in that manner; and the devise expressly created a tenancy *in common*, which was impossible *by descent*, as that must have been *in coparcenary*; and besides, there were words of limitation *in fee* grafted on the words *heirs of the body*, which could not have been satisfied by an estate-tail in the ancestor.

Ferrin v.
Blake,
4 Burr.
2579.
1 Bl. Rep.
672. Doug.
329. note.

W. Williams, being seised in fee of a plantation in *Jamaica*, devised in the following words:—"Should my wife be enseint with child, at any time hereafter, and it be a female, I give and bequeath unto her the sum of 2000*l.*, &c.; if it be a male, I give and bequeath my estate, real and personal, equally to be divided between the said infant and my son *J. W.*, when the said infant shall attain the age of 21. *Item*, It is my intent and meaning, *that none of my children should sell or dispose of my estate for longer time than his life; and to that intent* I give, devise, and bequeath all the rest and residue of my estate to my son *J. W.* and the said infant, for and during the term of their natural lives; the remainder to my brother-in-law *J. G.* and his heirs, for and during the lives of my said son *J. W.* and the said infant; the remainder to the heirs of the body of my said son *J. W.* and the said infant, lawfully begotten or to be begotten; the remainder to my daughters, &c." No other son was born, and the question was, what estate *J. W.* took under this will?

The

The court of King's Bench (*Vates, J. dissent.*) determined, that he took only an estate for life. This judgment was reversed in the Exchequer-chamber, from which an appeal was lodged in the House of Lords. The judgment of that House, however, was never had; for after the appeal had depended a considerable time, the parties compromised the dispute, and the plaintiff obtained leave to withdraw his writ of error.

J. N. devised his estate to his two daughters, equally to be divided between them, not as jointenants, but as tenants in common, *viz.* the one moiety or half part thereof to his daughter *E. N.*, and her heirs for ever; and the other moiety to his daughter *S.* the wife of *W. H.* during the term of her natural life, and after her decease *to the issue of her body lawfully begotten, and their heirs for ever.* It was adjudged, that *S.* the second daughter took only an estate for life, with remainders to her children, as purchasers. For if the devise of the second moiety were construed to give an estate-tail to this daughter, the devisors's estate would not be equally divided, for then the ultimate reversion of the second moiety would be again subdivided between the heirs of the two daughters; and the first daughter and her heirs would take a moiety of this reversion over and above what they take under the devise of the first moiety of the whole.]

A. devises his estate to trustees and their heirs, in trust for *B.* for life, and to his first and other sons in tail; but in case *A.* died without an heir male of his body begotten, the trust to be void; and in such case he gave the estate to *J. S.* It was held, that these words, *if he die without heir male of his body begotten*, did not give him an estate-tail by implication, nor enlarge an express estate devised to him for life.

in 1 Vez. 26 to be wrong reported by him. S. C. cited in 8 Mod. 260. Fitzgib. 26, 27. 1 P. Wms. 333-

If *A.* devises to *D.*, his daughter for life, and after her decease to her first son, and the heir of his body; and if he dies without heirs of his body, then to her second and other sons, and the heirs of their bodies, and after them to *N.* *in eodem forma*, and for default of such issue, to *J. S.* in fee; and after the will was finished, but before publication, the testator adds this clause: *Memorandum, the intent and meaning of the testator is, that D. shall not alien the lands given to her, but they shall be to her heirs male; and for want of such issue, to N.* This restrictive clause explains the intent of the testator, and therefore *B.* shall have an estate for life, and not an estate-tail by implication.

[Where the devise was to *A.* for life, with power to trustees to settle a jointure, if he married a gentlewoman, and, subject to such jointure, a direction to limit the estate on the issue of the marriage in strict settlement; but if *A.* died without issue of his body, then over; Lord *Hardwicke* held, that the latter words gave *A.* an estate-tail by implication.

Sir *W. D.* devised all his manors, messuages, lands, &c. to his daughter *M. D.* for life, remainder to trustees to preserve, &c. remainder to her first son in tail male, remainder to every other son in tail general; and gave all his personal estate to trustees, to

Roe v. Collys, 4 Term Rep. 294.

2 Vern. 427. 449. Pop- ham and Bamfield. 1 P. Wms. 54. S. C. 1 Salk. 236. S. C. but said by Lord Hardwicke, 1 P. Wms. 333-

Skin. 240. pl. 5. 3 Mod. 62. 311. S. C. cited. Vent. 230. 4 Mod. 318. Pollex. 657. 2 Show. 405. pl. 377. Eq. Abr. 184. pl. 25. Friend and Bouchier.

Allanfon v. Clithrow, 1 Vez. 24.

Letheullier v. Tracey, 3 Atk. 774. Ambli. 204. 220. S. C.

be

be laid out in land; and settled upon his daughter and her issue, in such manner as he had devised his manors, &c.; and *in case his said daughter should die without issue of her body living at her decease*, then he devised to trustees his manors, &c. and also all his personal estate, to be laid out as aforesaid; upon trust, to receive the rents and profits thereof annually, as well of the lands so to be purchased, as of all other the premises so as aforesaid devised to them, and lay out the same in the purchase of lands of inheritance in the county of G. or some adjacent county, and also the rents thereof, until his cousin, Sir H. N. should attain his age of 21 years. And then the will goes on in these words: “*Item, I give and devise all my manors, &c. unto my cousin, Sir H. N. after he shall have attained the age of 21 years, (taking the name of D.) for life, without impeachment of waste; with remainder to his first, &c. sons in tail male, remainder to his daughters in tail. And in default of such issue, or in case the said Sir H. N. shall happen to die before he attain his said age of 21 years, and without issue, then to S. L. (taking the name of D.) for life, with remainders to his sons in tail male; and for default of such issue*” — And then there was a blank, without any farther disposition. Lord Hardwicke held, that M. D. the testator’s daughter, was not entitled to an estate-tail by implication; for that the words “*if my said daughter should die without issue living at her decease,*” are to be considered as if he had added *during the minority of Sir H. N.*, and do not give an estate-tail to the daughter, but her issue take by purchase.

Robinson v.
Robinson,
1 Burr. 38.

A testator devised all his real estate to L. H. for and during the term of his natural life, *and no longer*; provided that he altered his name, and took that of R. and live at his house at B.; and after his decease to *such son as he should have*, lawfully to be begotten, taking the name of R.: and for default of *such issue*, then he bequeathed the same to his cousin W. R. and his heirs for ever: And he further willed, that the said W. R. have liberty to present whom he pleases to any vacancy that should happen in any of his (the said testator’s) presentations, during his life; and in case any of his children should take or be designed for holy orders, then it was his (the said testator’s) desire, that in case of any vacancy in either of his presentations, bonds of resignation be taken to such child or children, if the vacancy happen before he or they attain such orders; and after the same should be disposed of as aforesaid, then he gave *the perpetuity of the said presentations to the said L. H. in the same manner, and to the same uses*, as he had before given his estate. The court of King’s Bench certified; that upon the true construction of this will, the said L. H. must, by necessary implication, to effectuate the manifest general intent of the testator, be construed to take an estate in tail male, he and the heirs of his body taking the name of R.; notwithstanding the express estate devised to the said L. H. *for his life, and no longer*.

Evans v.
Abley,
3 Burr.
1570.

Sir S. D. devised all his manors, &c. to S. D. son of C. D. during his natural life, and the heirs male of his body lawfully

to be begotten; and for want of such issue, to *C. D.*, another of the sons of the said *C. D.* during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, to *J. D.* another of the sons of the said *C. D.* during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, then to every son and sons of the said *C. D.* which should be begotten on the body of *Sarah* his then wife; and for want of such issue, then to *W. H.* for his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, to *S. G.* for and during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, to *J. G.* for and during his life, and the heirs male of his body lawfully to be begotten; with the reversion to the testator's right heirs. There was a proviso annexed to the devise to the said *S. D.* and others, that if the estates devised to him or them and their descendants, should come to him or them and be in possession, then and thereupon he and they and their descendants to whom the premises should come and be in possession, should procure an act of parliament to take his name and arms; otherwise their estates should determine. The testator also devised several things to go, as heir-looms, along with the estate; and he gave powers to make leases and jointures. The three sons of *C. D.* viz. *S. D.*, *C. D.* and *J. D.* all died without issue. But *C. D.* had a fourth son, named *W.* born after the making of the will, who became seised, and took the name and arms according to the directions of the will. It was adjudged, that this son took an estate-tail, for that the testator evidently intended the same estate for the after-born sons, as he had given to the others.

J. B. devised, after the death of his nephew *W. B.*, eldest son of his brother *R. B.* without issue, to the second son of his said brother *R. B.* for and during the term of his natural life; and after the death of the said second son of his said brother *R. B.* then to the first son of the body of such second son of his said brother *R. B.* lawfully begotten or to be begotten, and to the heirs male of the body of such second son lawfully to be begotten; and for want of such issue, to the third, fourth, fifth, and every younger son or sons of the said second son of the said *R. B.* (according to their seniority) and to the heirs male of the bodies of the said third, fourth, fifth, and other sons of the said second son of the said *R. B.*, with remainders over. At the time of making the will, *R. B.* had no other son but *W. B.* His second son *T. B.* was born after the making of the will, and after the testator's death. The question being, whether *T. B.* the second son of *R. B.* took an estate-tail under this will, or an estate for life only? It was pressed upon the court in order to make it an estate for life only, to change the limitation to the heirs male of the body of such second son, to the heirs male of the body of such first son of such second son, and to insert a limitation to the second son of the said second son; but the court said, that they could not supply a contingency omitted in the most favourable case that could exist; that adding these words in this case would introduce a void limitation, for that a possibility could not be devised upon a possibility; that it would defeat the intention

Chapman
v. Brown,
3 Burr.
1626.

tention of the testator; that that intention could not be answered but by giving the second son of *R. B.* an estate-tail; and that, as the words stood in the will, he took an estate-tail.

Hay v. Earl
of Coventry,
3 Term
Rep. 83.

An estate was devised to *A.* for life, remainder to trustees to preserve, &c. remainder to his first and other sons in tail male, remainder to *B.* for life, remainder to trustees to preserve, &c. remainder to his first and other sons in tail male, remainder to the use of all and every the daughters of *A.* and *B.* as tenants in common; and in default of such issue, to the use of the right heirs of the devisor. After the death of *A.* and *B.* without any son, an only daughter of *B.*, it was adjudged, took only an estate for life, for that here the testator has used no words testifying his intention to give an estate of inheritance to the daughters, and the court could not supply them.

Doe v.
Applin,
4 Term
Rep. 82.

A testator devised to his nephew *W. D.* all his estate at, &c. to hold to him during his natural life, and after his decease *to and amongst his issue*, and in default of such issue, he gave the estate over. The court said, that in this case, as in that of *Robinson v. Robinson*, they must, to answer the devisor's general intention, defeat some particular intent: that his general intent was to give *W. D.* an estate-tail; and that to effectuate that intent they must reject the words "*to and amongst.*"

2 Vern. 526.
between
Leonard
and Earl
of Suffex,
decreed in
Chancery.

If *A.* devises lands to trustees to pay debts and legacies, and then to settle the remainder of one moiety of what should remain unsold to *H.*, and the heirs of his body by a second wife, and in default of such issue to her son *F.* and the heirs of his body; the other moiety to *F.* and the heirs of his body, with remainders over, taking special care in such settlement, that it never be in the power of either of my said sons *F.* or *H.* to dock the entail of either of the said moieties given them, as aforesaid, during their or either of their life or lives; this estate being only executory, it must be construed as if like provision had been contained in marriage-articles; and therefore the sons shall have estates for life conveyed to them; but it must be without impeachment of waste.

Attorney
General v.
Sutton, 1 P.
Wms. 754.
2 Br. P. C.
282. S. C.
Vin. Abr.
tit. Devise,
(B. b.)
pl. 22. S. C.
Fort. 66.
S. C. cited.

[*J. S.* being seised in fee of a legal estate in *L.*, and of a trust or equitable estate in *S.*, by his will directed *B.* his nephew and trustee in the land in *S.* to convey his land in *S.* to the uses of his will; which if he refused to do, or to acknowledge the trusts of his will in manner therein mentioned, then "all the gifts, legacies, and bequests in the said will given, devised, and bequeathed to the said *B.* and the heirs male of his body should be void." He then devised all his lands in *L.* and *S.* to *B.* for life, and afterwards to the first son, or issue male of his body lawfully to be begotten, and to the heirs male of the body of such first son, remainder to *B.*'s second son, and his issue male in tail, (not carrying over the limitations to his third or other son,) subject to a proviso, "that the said *B.* or his assigns and the heirs male of his body should not commit waste upon the said premises, and should not impeach, question, or endeavour to defeat, avoid, destroy, invalidate, or obstruct the payment of all or any the annuities, legacies, or charitable bequests in the said will." And from and after the death of the testator's wife, and of the said

said *B.* without issue male of his body, or after the death of such issue male, he devised all his said premises to trustees for charities. Afterwards *A.* suffered a recovery, and died without issue; and the question was, whether the recovery barred the charities? As to which, on an appeal from the court of Exchequer to the House of Lords, it was agreed by all the Lords, that the recovery was good of the lands in *L.*, of which the testator had a legal estate, and that the charities were barred by it; but as to the trust lands in *S.* the order of the court of Exchequer was reversed by a majority; the effect of which being only to reverse the plea allowed by the Exchequer, it only put the respondent to answer over, without determining the right any way against him. However, in consequence of this order, the Barons decreed, that the recovery of the trust estate was void, as contrary to the trusts created by the will; and there having been no conveyance of the lands in *S.* to trustees, pursuant to the directions in the will, they directed such a conveyance, and a perpetual injunction for quieting possession. As to the lands in *L.*, in which the testator had the legal estate, the court, after a trial at law, and a special verdict found, gave judgment for the lessors of the plaintiff, being of opinion that the nephews took an estate-tail in those lands, and they ordered the tenants to attorn.

Lands were devised to trustees and their heirs, in trust, until the marriage or death of the testator's grand-daughter, to receive the rents and profits, and pay her an annuity for her maintenance, and as to the residue to pay his debts and legacies, and after payment thereof, in trust for his grand-daughter; and if she married a protestant, after her age, or with consent, &c. then to convey the estate after such marriage to the use of her for life, without impeachment of waste, remainder to her husband for life, remainder to the issue of her body, with several remainders over. Lord *Talbot* held, that the grand-daughter was *tenant for life* only, with remainders over in strict settlement.

Lord Glenorchy v. Bosville, Ca. temp. Talb. 4.

An estate was devised to trustees to convey to the use of the testator's daughter, for the term of her natural life, and so as she alone, or such person as she should appoint, should take and receive the rents and profits thereof, and so as her husband was not to intermeddle therewith; and from and after her decease, in trust *for the heirs of the body* of the said daughter for ever. Lord *Hardwicke* said, that it was plainly the intention of the testator, that the husband should have no manner of benefit from the estate either in the lifetime of the wife, or after her decease, (for immediately upon her decease it was to be conveyed in trust for the heirs of her body); the wife therefore could only take an estate for life; for if she were entitled to an estate-tail, the husband must be entitled to be tenant by the curtesy.

Roberts v. Dixwell, 1 Atk. 607.

A. M. devised all his lands in *B.* and *C.* to trustees, in trust, to sell the same, and with the money arising by the sale, to purchase other freehold lands, or long annuities, or stock, or some other publick fund; and then to permit the defendant and his assigns to receive the interest and profits thereof during his life; and he further

Meure v. Meure, 2 Atk. 265.

further directed, that the defendant should receive the rents and profits of the estates until sold to his own use; and after the defendant's decease, then in trust to permit the plaintiff and his assigns to receive the interest and profits of the said money as aforesaid, or the rents and profits of the said land, if unsold, or such other lands as should be purchased, during his natural life; and after his decease, then in trust for the use of the issue of the body of the plaintiff lawfully begotten; and in default of such issue, the estates were devised over in fee. One of the trustees in the will died before the estates were sold, but after he had proved the will. On a bill brought by the plaintiff to have the estates sold by a decree of the court, and that the money arising thereby might be disposed of according to the will; the question was, whether an estate-tail was to be limited to the plaintiff in the lands to be purchased, or an estate for life only? By the Master of the Rolls:—Where lands are to be settled to one for life, and to the heirs of his body, there is no case where such a limitation has not been held to be an estate-tail: on the other hand, there is no case where they are to be settled to one for life, and after his death to the issue of his body, that such a limitation hath been construed an estate-tail. In *Sweetapple v. Bindon*, 2 Vern. 536. there was no estate for life particularly given before the word *issue*, which differs it from the present case; and yet Lord Keeper *Wright* said, upon the like words in marriage articles it would not have been construed an estate-tail, when it appeared the estate was intended to be preserved for the issue. And in the case of *Bale v. Coleman* it is laid down, that there is a difference between a deed and a will, as to construction. There is something in this will that denotes the intention of the testator, that the plaintiff should only take an estate for life, for there is a distinction between the wording and framing of the limitations: in the first place, the estate is during the lives of the defendant and the plaintiff to continue in the trustees; and when the testator limits it to the plaintiff for life, it is to permit the plaintiff to receive the rents and profits, &c.; and when the limitation is to the issue, it is to their use and behoof, and the court should, as near as they can, preserve the intention of the testator. The words, *in default of such issue to A. F.*, shew the testator intended, that *F.* the remainder-man should not take while there was issue of the plaintiff; issue of his body takes in both male and female, and there must be cross-remainders to the issue female. Lord *Glenorchy v. Bosville* is in point, and I shall in this case make my decree accordingly.

Bagshaw v. Spencer,
2 Atk. 246.
570. 577.
1 Vez. 142.
See observations on this case in Jones v. Morgan,
1 Br. Ch. Rep. 206.
Fearne's Con-

A. devised lands to five trustees, their heirs and assigns, in trust, by rents and profits, sale or mortgage, to pay his debts, &c.; and after payment thereof, he devised the same estates to three of the same trustees, their executors, &c. for 500 years upon trust to pay his legacies, and an annuity of 200*l.* per annum to his sister for life; and after the determination of the said estate for years, he devised the same premises to all the said trustees and their heirs, in trust, as to a moiety, to the use of *T.*, his nephew for life, without impeachment of waste, and after the determination of that

estate,

estate, to the trustees and their heirs during the life of *T.*, to support contingent remainders, and after his decease, to the use of the heirs of the body of *T.* lawfully begotten, and for want of such issue, then to the use of his nephew *B.* for the term of his natural life, without impeachment of waste, and after the determination of that estate, to the same trustees during the life of *B.*, to preserve contingent remainders; and after his decease, then to the use of the heirs of the body of *B.* lawfully begotten, with like remainders to other nephews. The first devisee *T.* died without issue; upon whose decease *B.* the next in remainder filed his bill, praying, among other things, to be let into possession of a moiety of the estates: afterwards *B.* dying pending the suit, his widow and devisee brought a bill of revivor and supplemental bill, charging, that *B.* in his lifetime, by bargain and sale enrolled, conveyed this moiety of the estates to two persons and their heirs, to make them tenants of the freehold, and suffered a recovery thereof (in which he was vouched) to the use of himself in fee; and afterwards devised his said moiety to his widow in fee, and died without issue. The general question between the parties was, whether an estate-tail, or an estate for life only, passed by the will of *A.* to *B.*? It was insisted for the plaintiff, that it was an estate-tail, upon the general rule, that where lands are limited to a man for life, with a limitation in the same deed or gift to the heirs of his body, that this makes an estate-tail; and that a devise of lands in the same way passed the same estate; that the limitation was either a legal estate, or a trust vested or executed, and not executory. On the other hand, it was contended, that those rules were artificial, not founded in justice, but for support of the feudal tenures, and therefore the judges ought to shew themselves *astuti* in supporting exceptions to such rules. The Master of the Rolls, however, held it to be a *trust*, and not a *legal estate*; but decreed that *B.* was entitled to an *estate-tail* in the moiety so devised to him; as it was the case of an immediate devise, and not a devise of lands to be settled. Upon an appeal to Lord *Hardwicke* from this decree, he agreed, that this devise was only a trust in equity; but that this being the case of a trust, the court was bound to carry it into execution according to the intent of the testator; that the intent was clear that the words "heirs of the body" should be taken as words of purchase, from the clause, *without impeachment of waste*, and the limitation to trustees to support contingent remainders: that there was no distinction between trusts executed and executory; that all trusts were in notion of law executory, and to be carried into execution by the court. His Lordship therefore reversed so much of the decree at the Rolls as gave *B.* an estate-tail under the will.

J. A. devised 6000*l.* South-sea stock, and 1200*l.* to trustees, to sell and lay out in the purchase of lands, to convey to *G. J. A.* for life, and afterwards to the issue of his body: in default of such issue, then over. *G. J. A.* brought a bill for performance: the question was, whether he had an estate for life, or in tail? It was insisted for him, that if it had been a devise of land, he would be tenant in tail; and there should be the same construction in this

ing. Re-
mainders,
4th Ed. 275.
&c.

Ashton v.
Ashton,
1 Vez. 149.

this case: but the court held it an estate for life only of the lands to be purchased.

White v.
Carter,
Ambl. 670.

Personal estate was bequeathed to trustees, in trust, to lay out the same in land to be settled and assured as counsel should devise, unto and upon the trustees and their heirs, upon trust, and to and for the use of *P. and the heirs male of his body*, to take in *succession* and *priority of birth*, and for default of such issue male, then, upon further trust, and to and for the use of *B. and the heirs male of her body*, to take in succession and priority of birth, remainder over. And the testator ordered the trustees to pay the remainder of the interest, dividends and profits, after deducting the expences of the trust, until the purchase or purchases made, to *P. and B.* respectively, and to their *respective sons and issue male*, who should be *respectively entitled* to the rents and profits of the estates to be purchased. Upon the question, whether the lands to be purchased should be settled on *P.* as tenant in tail, or in strict settlement upon him for life, with remainder to his first and other sons in tail male, Lord *Northington*, on hearing, directed the settlement to be made on him for life, with remainder to his first and other sons in tail male. Upon a re-hearing, Lord *Camden* was clearly of opinion to confirm the decree, and took a distinction between the case where a testator has given complete directions for settling his estate with perfect limitations, and where his directions are incomplete, and are rather minutes or instructions: in the former case, he said, the legal expression should have legal effect, though perhaps contrary to his intention, as in *Garth v. Baldwin*; in the latter, the court would consider the intention, and direct the conveyance according to it. Here, the intention was very plain; the testator directed the settlement to be made by *advice of counsel*, and in *succession and priority*. He meant something different from an estate-tail, when he wanted the assistance of counsel; and though the words *in succession and priority* might have effect in case *P.* took an estate-tail, yet they were meant to give an interest to the sons after the death of *P.*; the latter clause put it out of doubt; he there explained his meaning by making use of the words *sons and issue*.

Eastard v.
Proby, 2 P.
Wms. 478.
note.

P. P. devised "to *A.*, *B.*, and *C.*, and their heirs and assigns " for ever, to the use of them, their heirs and assigns for " ever, all his manors, lands, &c. in the county of *D.* and else- " where, upon trust, to set the same out in such manner as they " should approve, for the benefit of his (the testator's) daughter " *J.*, and the rents and profits thereof, to lay out and apply for " her most advantage, until she should attain her age of 21, or be " married; and on her attaining that age, that the said trustees " or the survivor of them, or the heirs of such survivor, *should, as* " *counsel should advise, convey, settle, and assure* the said manors, " lands, &c. unto, or to the use of, or in trust for the said *J.* for her " life, and after her death, then on the heirs of her body lawfully " issuing; but in case his said daughter should die without leaving " issue of her body lawfully begotten, then he devised all his said " real estates to his brother *J. P.*, his heirs and assigns for ever."

On

On a bill filed by the daughter and her husband to have the trusts of this will carried into execution, Sir *Lloyd Kenyon*, M. R. declared, that on the true construction of the will, in the events which had happened, the real estates ought to be settled on Mrs. *Bastard* for life, with remainder to her first and other sons successively in tail general, remainder to her daughters in tail general, as tenants in common, with cross-remainders in tail general, with remainder in fee to *J. P.* And his Honour ordered, that the Master should settle proper conveyances according to such directions, and that the defendants, the trustees, should execute the same.]

A. makes a settlement of his estate on *B.* his son, for life, remainder to his first, &c. son in tail male. Afterwards the reversion in fee being in himself, he made his will as followeth: *As touching my lands and tenements, &c. my will is, that if my son's wife die, during the life of her husband, without issue male, that then he shall have power to make a jointure to any other wife; and for want of such issue male of my said son, then the lands shall be and remain to my son, &c. by any other wife, and my granddaughter shall have 4000 l. And in case of failure of issue male by my son, then all my lands shall go to my grandchildren and their heirs, share and share alike.* Adjudged, that the settlement and will being distinct conveyances, the estate for life in the settlement cannot be tacked to the estate in the will, so as to create an estate-tail in the son, so that he continued only tenant for life.

4 Mod. 316.
Skin. 359.
pl. 1.
Ld. Raym.
37. S. C.
Moor and
Parker.
[Lady
Lanelbo-
rough v.
Fox, Ca.
temp. Talb.
262. S. P.
Doe v.
Fonnereau,
Douglt. 487.
S. P.
Habergham
v. Vincent,

5 Term Rep. 92. 2 Vez. jun. 204. S. P. So, an equitable estate for life cannot unite with a legal estate-tail, nor *vice versa*. *Shapland v. Smith*, 1 Br. Ch. Rep. 75. *Knight v. Ellis*, 2 Br. Ch. Rep. 570.]

A man seized in fee, devised to *J. B.* for his life only, without impeachment of waste, and from and after his decease, then to the issue male of his body lawfully to be begotten, if God shall bless him with any, and to the heirs male of the bodies of such issue lawfully begotten; and for default of such issue, remainder to *J. C.* and the heirs male of his body; and for want of such issue, he limits two remainders over in the same words: it was adjudged, that *J. B.* took only an estate for life, for the estate was given to him for life, and there was a limitation afterwards to his issue, which was a description of the person who was to take the estate-tail.

Abr. Eq.
184. pl. 27.
10 Mod. 181.
cited in Fitz-
gib. 12. 22.
8 Mod. 261.
383.
Fortesc. 133.
Ch. Caf. 173.
Backhouse
and Wells.
Gilb. Ca.
8vo. 20.
129.

A. devised certain lands to his eldest son for life, without impeachment of waste, remainder to *J. S.* his grandchild for life, without impeachment of waste, with power to him to limit a jointure of the same land to any woman he should marry, for her life; and after his death he devised the lands to the first son of *J. S.* the grandchild in tail, and so to the sixth son; and then devised, that if *J. S.* the grandchild should die without issue male, the land should remain to *J. B.* Held that *J. S.* took an estate-tail; for if there had been a seventh son, he could not have taken; and there it was necessary to create an estate-tail by implication.

Abr. Eq.
185. P.
Wms. 759.
S. C. cited.
8 Mod. 258.
384.
Fitzgib. 14.
Langley and
Baldwin,
certified to
be an estate-
tail by the
court of
Common
Pleas, and

decreed accordingly in Chancery. S. C. cited in 1 Vez. 26. and said to be wrong reported in Eq. Abr.

Legatt and
Shewell,
2 Vern. 551.
S. C. but no
resolution.
Eq. Abr
389. 394.
pl. 7.
Gillb. Eq.
Rep. 145.
1 P. Wms.
87. 90, 91
pl. 17.
(a) Though
P. Williams
says the parties agreed, yet in 2 Vez 657. Lord Hardwicke says, that Lord Cowper thought him-
self bound to agree with the three judges, and so decreed.]

A. devised the surplus of his personal estate to be laid out in a purchase of lands to be settled on *B.* his nephew for life, and after his decease to the heirs male of the body of the said nephew, and to the heirs male of the body of every such heir male severally and successively one after another, as they shall be in seniority of age and priority of birth, every elder, and the heirs male of his body, to be preferred before every younger; and for want of such issue, to his brother in the same manner. On a case stated for the opinion of the court of Common Pleas, three of the judges certified (*a*), that the nephew should have an estate-tail conveyed to him, but Judge *Tracy* held it only an estate for life.

Abr. Eq.
185-6 Pa-
pillon and
Voyce, de-
creed at the
rolls. 2 P.
Wms. 471.
pl. 150.
Fitzgib. 38.
S. C. cited
in Ca. temp.
Tab. 8.

The plaintiff's father, by his will, devised the estate in question to the plaintiff for life, without impeachment of waste, remainder to trustees during his life, to support contingent remainders, with remainder to the heirs of the body of his said son, reversion to himself in fee, with a power to the son to make a jointure of such a part; and devised likewise a considerable personal estate to be laid out in a purchase of lands, and settled to the same uses; and the only question was, whether the plaintiff took an estate-tail, or only an estate for life? and it was held, that he took only an estate for life, as the words were express, and had all the other marks attendant on an estate for life; and, consequently, that the heirs of the body should take by purchase; and though the estate would vest in the first son as tenant in tail by way of purchase, yet not so as to exclude the other sons, or their issue, from taking the like estate, whenever his estate determined for want of issue.

Abr. Eq.
184. pl. 28.
Gillb. Eq.
Rep. 28.
3 Danv.
Abr. 178.
pl. 26.
2 Mod. 253.
382.
Forsefc. 58.
2 Stra. 798.
Barnard.
K. B. 54.
Fitzgib. 7.
Shaw and
Weigh, ad-
judged an
estate-tail in
the sister, in
the Great
Sessions of
Wales, but
that judg-
ment re-
versed by
B. R. where
it was held
only an
estate for
life; but

A. devises lands to his wife for life, and for her better support he gives and bequeaths unto her the sum of 500 *l.* to be raised by his executors or administrators, by sale of timber, or by sale of any part of the premises, or otherwise, by digging, sinking, getting, and sale of coal on the premises, or any part thereof, at her, her executors and administrators, choice and election; and if my said wife shall happen to die before the said sum be raised, as aforesaid, then such person whom she had appointed in her lifetime to raise, &c. for which I give them and her full power and authority; provided nevertheless, that if either of my sisters hereafter named, or such person for whom my trustees hereafter named shall be trustees, shall pay unto my wife, her executors, &c. the said sum of 500 *l.*, that the said power of selling shall cease; and after the decease of my said wife, I devise all my estate before mentioned to *A.*, *B.*, and *C.*, and the survivor and survivors of them, upon the trusts hereafter mentioned, that is to say, in trust for my sisters *A. L.* and *D. E.* equally betwixt them, during their natural lives, without committing any manner of waste, from and after the decease of my said wife; provided always, that what sum or sums of money, in part or in full of the said 500 *l.* hereby left my wife, shall be really paid my wife, her executors, &c. by either of my said sisters, that in that case my will is,

is, that such money be likewise raised by the getting of coal on the premises only; and if either of my said sisters happen to die, leaving issue or issues of her or their bodies lawfully begotten, or to be begotten, then in trust for such issue or issues of the mother's share, or else in trust for the survivor or survivors of them, and their respective issue or issues; and if it shall happen that both my said sisters die without issue, as aforesaid, and their issue or issues too die without issue or issues lawfully to be begotten; the said trustees to stand and be intrusted to and for my kinsman *T. S.* and the heirs male of his body, &c. and for want of such issue, then in trust for *R. G.* This was held an estate-tail in the sisters.

[*A.* devised lands, in trust, for *B.* for life, with a leasing power, and after his decease, in trust, for the heirs male of his body. Lord Keeper-decreed an estate-tail to be conveyed to *B.*, although he admitted, that upon articles of marriage, founded upon an agreement, *B.* might in such case be made only tenant for life; but in a will (he said) *you must take words as you find them.*

the judgment of *B. R.* reversed in the House of Peers, by the opinion of *Eyres, C. J.* *Pengelly* and *Fortescue.* 3 Br. P. C. 469.

Lands were devised to a trustee, in trust, to pay the rents and profits to *S.* for her separate use during her life, as if she were sole, and after her decease, to pay the same to *E.* her son for life, and afterwards to pay the same to the heirs of his body, and for want of such issue, to pay the same to all and every other son or sons of the body of *S.* begotten, &c. Lord *Hardwicke* decreed a conveyance in tail to *B.* of the estate so devised.

Bale v. Coleman, 1 P. Wms. 142. 2 Vern. 670. S. C. Vin. Abr. tit. Devise (D. b), pl. 7. S. C. more fully reported.

A testator devised to trustees and their heirs, upon trust, after his death, by and out of the rents and profits to raise 500 *l.* with interest, and pay the same to his five grandchildren; and subject to the raising and paying of the said 500 *l.*, and the interest thereof, to the use of his nephew for life; subject nevertheless to his nephew's qualifying himself according to a proviso thereafter contained, with remainder to the said trustees and their heirs to preserve contingent remainders, with remainder to the use of the heirs male of the said *T. R.* and their heirs, provided that, in case his said nephew *T. R.* should die without having any issue male of his body living at his death, then he charged the premises with 100 *l.* a-piece to two nieces, if then living, at their respective ages of 21 years; if either died, her part to go to the survivor: And he empowered his said trustees, as soon as conveniently could or might be after the death of the said *T. R.* without issue male as aforesaid, by and out of the rents and profits of the premises, to raise and pay to his said two nieces the said 100 *l.* a-piece; and for default of such issue male of the said *T. R.* then he devised the premises (subject to the payment of the said 500 *l.* and 200 *l.*) to the use of all and every his said five grandchildren, or such as should be living at the time of failure of issue male of the said *T. R.*, to take as tenants in common, and to their respective heirs and assigns, equally to be divided between them, share and share alike, provided that the said *T. R.* should, immediately after the testator's death, be placed out an apprentice to a surgeon, or some other

Wright v. Pearson, *Fearne's C.* R. 187. Amb. 353. S. C.

good trade, for seven years, or else be sent to some college in *Cambridge*, there to continue till he was qualified to be ordained a clergyman; and in case he should refuse or neglect to be put out, and continue such apprenticeship, or qualifying himself to be ordained a clergyman, then his will was, that the estate so before limited to the said *T. R. for his life*, should cease and determine and be void, as if he had been dead, and that the said premises so limited to the said *T. R. for his life, and his issue male* as aforesaid, should thenceforth revert over, and go and remain to the use of such of his five grandchildren as should be living, to be equally divided amongst them, and to their respective heirs, as tenants in common. Lord Keeper *Henley* determined, that *T. R.* took an estate-tail.

Austen v.
Taylor,
Ambl. 376.

A testator, after giving certain lands to trustees and their heirs, in the first place to the intent his sisters should respectively have an annuity, or rent-charge of 80*l.* for their lives, with power of distress and entry; and subject thereto in trust for *P.* for life, remainder to trustees to preserve, &c., remainder to the heirs of the body of *P.*, remainder to his own right heirs; gave the residue of his personal estate to trustees, in trust, to buy lands in fee-simple; which he directed should remain, continue, and be to, for, and upon such and the like estate and estates, uses, trusts, intents, and purposes, and under and subject to the like charges, restrictions, and limitations, as were by him before devised, limited, and declared of and concerning his lands and premises thereinbefore last devised, or as near thereto as might be, and the deaths of persons would admit. It was adjudged by Lord Keeper *Henley*, that *P.* was entitled to an estate-tail in the lands to be purchased.

Jones v.
Morgan,
1 Br. Ch.
Ca. 206.

A testator devised his estate to trustees, to raise money (in aid of his personal estate) for payment of debts; and after payment of debts, and after limitations to the use of his youngest son, and the heirs male of his body, in the same manner as those following to his eldest son *W.*, *to the use of his son W. for and during his natural life, without impeachment of waste, and from and after his decease to the use and behoof of the heirs male of the body of his said son lawfully begotten, severally, respectively, and in remainder, the one after the other, as they and every of them should be in seniority of age and priority of birth, with remainder over.* Powers were given to the testator's sons, whilst in possession, of leasing, making jointures for wives, and raising portions for younger children. Upon a claim by the personal representative of *W.*, to the amount of an incumbrance which *W.* had paid off in exoneration of the estate, one point insisted upon in answer to it was, that *W.* was tenant in tail; and therefore his paying off the incumbrance was an exoneration of the estate. And Lord *Thurlow* was of opinion, that *W.* took an estate-tail. The decision of the cause, however, did not depend merely on the point of the devisee's taking an estate-tail; but the complexion of the chancellor's arguments, and the inferences from them, leave little room to doubt that his decision would have been the same, if it had turned on that point.

A. devised to his daughter *B.* for life, and after her death to her lawful issue, and if she should have no issue, that she should have power to dispose of the estate at her will and pleasure. *B.* was the testator's heir at law, and died without issue. She took an estate-tail, and a contingent fee by the will, and had a fee by descent.

Goodtitle v. Otway, 2 Will. 6.

Lands were devised to *M.* and his wife for their lives, remainder to the next heir male of their two bodies. It was holden a devise in tail; for that a devise to the heir male was a devise in tail, unless there are words of limitation superadded, so as to bring it within the reason of *Archer's* case, and that the words first, next, or eldest made no difference.

Miller v. Seagrave, Rob. Gav. 96.

A testator devised lands to *N.* for his life, and after the decease of *N.*, to the heirs male of the body of *N.* lawfully to be begotten, and his heirs for ever; but if the said *N.* should happen to die without such heir male, then he devised the lands to *B.*, &c.: The question was, whether *N.* took an estate-tail, or for life only, by the will? It was contended on one side, that the testator intended him only an estate for life, by his devising to him expressly for life; and then here were superadded words, *his heirs for ever*, engrafted on the words *heirs male*; that though these words *heirs male* were in the plural, yet the subsequent words *his* and *for default* of such heir male qualified them, so as to make them signify the same thing as *next heir male* in *Archer's* case. But the judges were all unanimous in opinion, that *N.* took an estate-tail, that the rule was settled so firmly that it was not to be disputed. They held that the subsequent words *his* and if he dies without such heir male, were not sufficient to restrain and alter the operation of the words *heirs male* and so qualify them as to make them a description of the person.

Goodright v. Pullyn, 2 Ld. Raym. 1437. 2 Str. 729. S. C. 1 Barnard. 6. S. C. 2 Eq. Ca. Abr. 315. S. C.

A devise to *L.* for life, then to the heirs of the body of *L.*, and their heirs, and if she died without such heir of her body; then over, was holden to be an estate-tail.

Morris v. Le Gay, cited 2 Burr. 2 Atk. 249.

A devise was to the testator's eldest son *W.* for life, remainder to his first son for life, remainder to the right heirs male of his body; remainder to other sons of *W.* and the heirs male of their bodies; remainder to the testator's son *T.* for life, and after to the first heir male of his body; remainder over. The court of *C. B.* held, that the words *heir male* were to be understood collectively, and gave an estate-tail to *T.*, it being distinguished from *Archer's* case, by no limitation being superadded to the words *first heir male*, and the word *first* signifying *first* in order of time. And the court of *K. B.* affirmed the judgment of *C. B.*

Dubber v. Trollope, Amba. 453.

Again, a devise was to *R. M.* and the first heir male of his body, and the heirs male of his body; and in default of such issue, to *E. M.* and the heirs male of his body, and their issues, remainder over. Lord *Hardwicke* held, that *R. M.* took an estate-tail.

Minchull v. Minchull, 1 Atk. 411.

Again, a devise was to *C.* for life, remainder to trustees to support contingent remainders during the life of *C.*, remainder to the heirs of the body of *C.* lawfully begotten. Upon a question, whether

Coulson v. Coulson, 2 Str. 1125. 2 Atk. 246.

ther *C.* took an estate-tail or for life? a case was stated for the opinion of the judges of *B. R.*, who certified, that by reason of the remainder interposing between the devise to *C.* for life, and the subsequent limitation to the heirs of his body, *C.* took an estate for life, not merged by the devise to the heirs of his body, but by that devise an estate-tail in remainder vested in *C.*

Roe v.
Grew,
2 Willf. 322.

A testator devised lands to his nephew, to hold to him during the term of his natural life, and from and after his decease to the use of *the issue male of his body* lawfully begotten, and the *heirs male* of the body of such *issue male*; and for want of such *issue male*, remainder over. The devisee had no issue at the time. The court of *C. P.* held, that he took an estate-tail; and one judge said, he thought too great regard had been paid to the words, "*heirs male of the body of such issue.*"

Sayer v.
Masterman,
Ambl. 344.
Fearn v. C. R.
C. R. 250.
S. C.

A devise was in the following words: "After the decease of my said brother *E. S.*, and on failure of issue as aforesaid, I give the said several estates and farms to my brother *G. S.*, and *the heirs of his body, the males having preference as aforesaid*, and succeeding according to *their births*, and to preserve the contingent remainders from being barred during the life of the said *G. S.*, I give the said estates and farms to my said friend *Dr. R.*; and on failure of issue of the said *G. S.*, I give the said estates and farms to my said niece *M. C.*" On the death of *E. S.* without issue, the question was, whether *G. S.* took an estate-tail, or an estate for life only, under the will? The court held, that the whole inheritance was not vested in the trustee in this case; that he took only a descendible freehold during the life of *G. S.*, for the word *estates* there meant only the thing and not the interest, it being coupled with the word *farms*: that by inserting the limitation to the trustee next after the limitation to *G. S.*, the case would be like *Coulson v. Coulson*, with this difference, that it would not be quite so strong; because the estate was not given expressly to *G. S.* for life. They referred to Lord King's opinion in *Papillon v. Voice*, that the limitation to trustees did not control the estate-tail; and the court declared, that *G. S.* was entitled to an estate-tail.

King v.
Burrell,
Ambl. 378.
2 Term Rep.
496. note.
S. C.

A testator devised, after his wife's death, and failing issue of her body, a messuage, &c. in *A.* to *J. H.* for life, remainder to the issue male of *J. H.*, and to his and their heirs, share and share alike; and for want of such issue, to the issue female of *J. H.*, and her and their heirs; and for want of such issue, to *W. B.*, his heirs and assigns for ever. He also gave other houses at *R.* to his wife, remainder to *J. H.* for life; and from and immediately after the determination of that estate, to the *issue male* of the body of *J. H.* and to *their heirs*; and for want of such issue, to *W. R.*, his heirs and assigns for ever; with a proviso, that the bequest and limitation of all the premises limited to *J. H.*, and such *issue male and female*, was upon a special consideration, that if *J. H.* or his issue, or any of them, should alienate, mortgage, or incur, or commit any act or deed to alter, change, charge, or defeat the bequests, they should pay, &c.; and he did thereby charge the premises with

with the payment of 2000*l.* unto such person or persons, his or their heirs, as would, should, or ought to take next by virtue of any of the bequests or limitations. *J. H.* having no son, but two daughters, who were heirs at law of the testator, he joined with his daughters, in suffering a recovery of the estate in *M.* : Upon which, the plaintiff brought his bill for payment of the 2000*l.* But Lord Keeper *Henley*, after consideration, gave his opinion, that *J. H.* took an estate-tail, and that the proviso was repugnant to the estate.

C. V. devised to the defendant, and the issue of his body lawfully to be begotten, *living at his death*; and for want of such issue, to the University of *Oxford*, to be disposed of in such manner as by the will directed. Lord Keeper *Henley* held, that it was a clear estate-tail.

University
of Oxford v.
Cliftons,
Ambl. 385.

A devise was to *A.* for life, remainder to trustees to preserve contingent remainders during *A.*'s life, and from and after his decease, then to the heirs of his body. It was adjudged that *A.* took an estate for life, with a vested remainder to himself in tail, the words "heirs of the body" being words of limitation.

Hodgson v.
Ambrose,
Doug. 337.
judgment in
B R affirmed
in the
House of

Lords, Feb. 14, 1781.

A testator devised all the rest and residue of his estate, both real and personal, to his nephew *A. W.* and his sons in tail male; and for want of such issue male, to his brother *J. W.* and to his sons in tail male; and in failure of such issue male, then to his (the testator's) right heirs. Neither *A. W.* nor *J. W.* had any issue at the time of making the will, or at the death of the testator. Upon the death of *A. W.* without issue, the question was, what estate *J. W.* took in the premises under the will? And the court of *C. P.* held, that, upon the will and circumstances above stated, he took an estate in tail male.

Wharton v.
Giesham,
2 Bl. Rep.
1083.

A. devised all his lands, &c. to a trustee and his heirs, in trust, as to part, to suffer the testator's wife *Rebecca* to receive the rents and profits for her life; and as to the said part after his wife's decease, and the residue after his own decease, to other trustees for 100 years, to raise 200*l.* thereon for the use of his daughter *Mary*, and subject thereto, in trust, to pay the rents and profits to his daughter *Rebecca*, the wife of *P. Barry*, for her separate use during her natural life; and after her decease, "to the use and behoof of the heirs of the body of the said *Rebecca Barry* lawfully issuing; the elder of such issue, and his, her, and their heirs to inherit and take place before the younger of such issue, his, her, and their heirs," with remainders over in default of such issue. Both the daughters survived the testator, and his wife, and on the death of the latter, *Rebecca Barry* entered on the residue, and afterwards died, leaving two daughters, the defendant *Mary Anne*, the wife of *Ignatius Purcel*, and the plaintiff *Jane*, the wife of *Francis Heny*, and no other issue. The question was, whether *Jane Heny* took any and what estate in any and what part of the premises? And the court of *C. P.* certified, that the defendant *Mary Anne Purcel* took in the first place an estate-tail in the whole of the premises, and that the plaintiff

Heny v.
Purcel, 2 Bl.
Rep. 1092.

Jane Heny took an estate-tail in remainder, expectant on the determination of the precedent estate-tail, in the whole of the same premises, with remainders over in default of the heirs of her body.

*Doe v. Lord
Mulgrave,
5 Term
Rep. 320.*

Lord *Mulgrave* devised his estates real and personal, in these words, *viz.* "in trust to *T. &c.* for my first and every other son in tail male; failure of such issue, to my brother *H.* and his first and every other son in tail male; failure of such issue, to my brother *E.*, and his first and every other son in tail male; failure of such issue, to my brother *A.*, and his first and every other son in tail male; failure of such issue, to my daughter *C.*, and her first and every other son in tail male; and in failure of such issue, to her eldest daughter, and her first and every other son in tail male; failure of such issue, to her daughters respectively in succession; failure of such issue, to the last surviving Lord *Mulgrave*: in all the foregoing cases without impeachment of waste, other than wilful." Then, after making a provision for his daughter, he proceeded, "My will is, that the money lodged at *Child's* to pay for the purchase of the *Lyth* rectory, be applied to that purpose as soon as Sir *J. S.* can complete the title; and the renewals to be made by the tenant for life."—"I name the executors in trust of this my will Mrs. *A. J.*, my brother *H. P.*, or whichever of my brothers may succeed to the estate." It was adjudged, that *B.* took only a life estate, with remainder in tail to his issue.

*Fell v. Fell,
3 Will. 399*

A testator appointed his cousin *Solomon Fell* sole executor of his will, and heir for life of all his estates (except, *&c.*), and after his death to his son *Thomas Fell*, and his heirs male for ever; but if said *Thomas* should die without issue, then to his next heir male for ever, the elder to be preferred before the younger; and if no issue male left behind said *Solomon*, then the estate to devolve to the females; and if no females, then my said cousin *Solomon* to give and dispose of the same as he shall think fit. The testator died without issue, leaving *Solomon Fell* (the father of the defendant *Solomon Fell*, the devisee named in the will) his cousin and heir at law, who afterwards died, leaving the defendant *Solomon Fell* his only son and heir at law. The defendant *Solomon Fell* had, at the time of the testator's death, and at the time the said will and codicil were made, *Thomas* his eldest son, and the plaintiff his only daughter, and no other children living; but he had had another son named *Solomon*, who was dead when the will was made; but the testator, though he knew that the defendant had had such a son *Solomon* born, did not then know that he was dead. *Thomas Fell*, the son of the defendant, died soon after the testator, and the plaintiff was the only surviving child of the defendant. A bill being filed by the plaintiff to restrain the defendant from cutting down timber and committing waste on the estates devised, a case was sent out of Chancery for the opinion of the judges of the court of *C. P.* as to what estate the defendant took in the premises under the will; and whether the plaintiff took any, and what estate in them. And the judges certified, that the defendant took

took an estate for life; and his son *Thomas* dying without issue, his daughter, the plaintiff, took an estate in tail general, and that a remainder in fee-simple was vested in the defendant.]

(E) Of Terms for Years, and uncertain Interests by Devise.

IF a man devises lands to his executors for payment of his debts, and after debts paid the remainder over; the remainder is good; but it shall not vest at the death of executors, but the estate shall be considered as an uncertain interest, which shall go from executor to executor for the payment of the debts; for if it were to determine by the death of the executors, the debts might never be paid.

8 Co. 96. a.
Cro. Eliz.
315.
Roll. Abr.
829. S. C.

If a man devises his land *to be sold by his executors*, or *to his executors to be sold*, the executors shall have the profits to their own use, and not as assets, therefore they are obliged to sell to the first purchaser: but if the devise had been, *that his executor should sell the land (a)*, there, they have not the profits of the land before the sale; for there are no words to break the descent from the heir, and carry it from him; and for that reason the land shall descend to him till the sale.

Co. Lit. 112.
b. 276. a.
vide head of
Heir and
Ancestor.
[(a) See acc.
Lancaster v.
Thornton,
2 Burr. 1027.
Yates v.
Compton, 2 P. Wms. 308.]

If a man possessed of a term for years, devises the land to another generally, the devisee shall have all the term, without any limitation to determine upon his death.

Roll. Abr.
831.

A. devises his lands to his executors till his son comes of age; the profits to be employed in the performance of his will: though the son dies before he be of age, yet the interest of the executors continues till he might be of age, if he had lived; for since the intent of the deviser governs in wills, it might destroy that, if the executor's interest ceased at the death of the son; for it is reasonable to believe that the testator found on a computation, that the profits of the land in that time would answer his debts, so that this is a good devise of the term till the son would be twenty-one, though he die before.

3 Co. 20.
Boraston's
case.
Chan. Ca.
113. S. P.

If a man devises land to his wife *till his son comes of age*, to provide his children with necessaries; though the wife dies before the son comes of age, yet her interest does not determine by her death, because it was not a matter of mere confidence, but shall go to her executors: but (b) if the devise had been, *that his land should descend to his son*, but *that his wife should have the full profits thereof until the full age of his son*, for his education; here is nothing devised to the wife, but a mere confidence that she shall take profits for the education of the son; and by the will she is but in nature of a guardian or bailiff, for the benefit of the infant, which determines by her death.

Cro. Eliz.
252.
2 Leon. 211.
Dyer, 210.

(b) 2 Leon.
221. S. P.

A man devised certain lands to his wife till his son and heir apparent should attain to his age of twenty-one years, and when his

Abr. Eq. 195.
Gilb. Eq.
Rep. 36.

Mansfield
and Dugard,
decreed Hil.
1713.

his son should attain to his age, then to his son and his heirs, and died; the son lived to the age of thirteen years, and then died; and the wife, supposing that she had a title to hold the lands till such time as the son would have attained his age of twenty-one years, in case he had lived to that time, continues in the perception of the rents and profits of the said lands for several years; and the bill was brought against her by the heir at law of the son, to have an account of the rents and profits from the death of the son; and though the wife was executrix likewise of her husband, yet it not being devised during that time, *for payment of debts, nor any creditors, nor want of assets appearing**, it was held by my Lord Chancellor, that the wife's estate determined by the death of the son, and that the remainder vested presently in the son upon the testator's death, and was not to expect till the contingency of his attaining his age of twenty-one years should happen, for then in that case it never would have vested, he dying before that age; and therefore decreed the wife to account for the profits from the time of the son's death; and upon a re-hearing his Lordship continued of the same opinion, and grounded himself on the distinctions taken in 3 Co. 19. and 6 Co. 35.

* This distinguishing it from the case above.

Sid. 151.
Roll. Abr.
831.
(a) So, if a term for 1000 years be devised to A., the remainder to B., and the heirs of his body; the whole term is vested in A. and B., has only a possibility, and no interest vests in him till the death of A.

A term was devised to B., and if he died within the term, the residue to go to C. after he attained his age of twenty-one years, B. died, and then C., before he came to that age: by this devise B. had the (a) whole term in him, (for if a termor devises his house, or his term, without more words, the devisee has the whole term,) and the residue of it was to go to C. on a precedent contingency, viz. when he came of age, which never happened, and, consequently, his executors can never have it: and the executors of the devisor have neither an interest, nor a possibility of one, because he made a total disposition of the term; as if a copyholder for life surrenders to the use of B. for life, who is admitted, and dies in the life of the surrenderor; yet he shall have no benefit by surviving him, because the whole interest was surrendered; therefore it was adjudged in the principal case, that the executors of B. should have the remainder of the term.

because, by the strict rules of law, an estate of freehold is greater than any term for years. 3 Lev. 264. Douce and Earl.

2 Lev. 191.
Vent. 326.
2 Mod. 223.
2 Jon. 73.
Paget and
Voicius.

A. devised to B. during his exile, and if it please God to restore him to his country, or if he die, then to J. S. B. was a Dutchman, and had a pension from the states, but upon some displeasure the states deprived him of his employment, and of his pension, and gave them to another, whereupon he voluntarily left the country, and lived here with A., who had been his acquaintance beyond sea; and after his coming hither a war happened between the Dutch and English, and afterwards a peace was concluded between the two nations, yet B. continued here; and whether his estate was determined, was the question? and the court held it was not, for that the exile intended by A. was the leaving his country, because of the states displeasure to him, and the withdrawing of his pension upon that displeasure.

If a copyholder devises his land to *A.* and *B.* his two sons, and to the heirs of their two bodies begotten, and wills, that each of them shall enter at the age of twenty-one years; the executors shall not take the profits till they are both of full age, but he who comes of age first shall enter, and then the other when he comes of age, and they shall hold the land jointly.

Cro. Jac.
250.
Yelv. 183.
vide Bull.
48. cont.

A. devised his lands to *B.* and *C.* and the survivor of them, till 800*l.* should be raised out of them: it was adjudged, that *B.* and *C.* should have the land no longer than they might have received it out of the profits; and that if a stranger enters after the death of the deviser, they may have an account of the mesne profits, but cannot hold the land longer than the sum might have been levied; for if that were allowed, they may make it an eternal charge on the heir's estate: but if the heir himself enters and disturbs them, they may hold over, for the heir shall have no benefit of his own wrong; or they may have their action against him, at their election.

4 Co. 82.
Corbet's
case. Cro.
Eliz. 890.
Salk. 153.
pl. 1. 1 P.
Wms. 518.

(F) Of Devises for the Payment of Debts.

Creditors are so far favoured, especially in equity, that wherever it appears to be the testator's intent, that his lands should be liable to his debts, they shall be subjected thereto, although there are not express words to charge them; and it seems remarkable, that in all the cases on this head, the lands have been held liable, and that chiefly on the intention of the testator; and therefore it seems difficult to lay down any rules in this matter, which depends purely on construction. Thus much, however, may be inferred from the very cases on which the lands have been held liable, that *a bare declaration by the testator, that his debts should be paid is not sufficient*; for this being no more than the law says, shall be intended of personal, and not out of the real estate.

Eq. Abr.
197.

A. devised all his lands to *B.*, and the heirs of his body, and in another part of his will, reciting, that he owed *B.* money upon account; he therefore devised to him all his personal estate, and made him executor, willing him to pay his debts; and upon the reading of the will, though the clause, as to the payment of debts, seemed to relate to the personal estate only; and though the lands were devised to *B.* in tail, with a remainder over to another; and it was objected, that a tenant in tail could not be a trustee; yet the court decreed both real and personal estate to be sold for payment of the testator's debts.

Vern. 457.

Vern. 411.
Clowdsley
and Pelham.
2 Vern. 229.
S. C. cited,
and the de-
cree said to
be affirmed
in the House
of Lords.

If *J. S.* devises his lands to his brother, who is his heir at law, in fee, and likewise devises several legacies, and makes his brother executor, desiring him to see his will performed according to the trust and confidence he had reposed in him; this makes the real estate liable, for the testator needed not have devised the estate to his brother, being heir at law, unless he intended that he should take them chargeable with the debts and legacies.

2 Vern. 228.
Alcock and
Sparhawk,
decreed in
Chancery,
and affirmed
in the House
of Lords.

A. devised

2 Vern. 690.

A. devised in the following words: I do by this my will dispose of such worldly estate as it hath pleased God to bestow upon me: first, I will that all my debts be paid and discharged, and out of the remainder of my estate I give and bequeath unto my wife 300 l.; my mind and will is, that my wife have one moiety of what is left, after my debts paid: Item, I give to my dear brother R. B. a cese lying in the parish of —, and for the remaining part of my estate, as well real as personal, I give and bequeath unto my brother J. B. whom I make executor: it was held clearly, that these words subjected his real estate to the payment of his debts.

Abr. Eq.
198-9. Trot
and Vernon.
2 Vern. 708.
S. C. where
it is said,
that some
stres was
laid on the
word devise.

So, where *A.* being seised of a real estate, and also possessed of some personal estate, made his will in writing, and thereby devised in these words: *Imprimis, I will and devise that all my debts, legacies, and funeral charges shall be paid and satisfied in the first place.* Item, *I give and devise*; and then proceeds to dispose of his real and personal estate; the personal estate not being sufficient, the question was, whether that clause in his will should amount to a charge on his real estate for the payment of his debts, legacies, and funerals? and my Lord Chancellor *Cowper* was clearly of opinion, that it should; for as to his debts, it was but natural justice they should be paid, and his personal estate would have been liable to the payment thereof, whether he had given any directions in his will about them, or not; when therefore he wills and devises, that his debts, legacies, and funerals shall be paid and satisfied in the *first place*, these words must be intended to give a preference, for those purposes, to any other whatsoever; and since he does not devise his real or personal estate to any person in particular, for those purposes, the persons who come within this description must be supposed to be within his view; and it must be taken as a devise for their benefit, preferable to any other disposition whatsoever, either of his real or personal estate, and, consequently, both of them are thereby made liable thereto.

Newman
v. Johnson,
1 Vern. 45.

[A man seised of copyhold lands surrenders them to the use of his will, and then by his will says, *viz. My debts and legacies being first deducted, I devise all my estate, both real and personal, to J. S.* It was holden by the Lord Chancellor, that this should amount to a devise to sell for payment of his debts.

Bowdler v.
Smith, Pr.
Ch. 264.

One devised in these words: *As to my temporal estate, wherewith God hath blessed me, I give and dispose thereof as follows: First, I will that all my debts be justly paid, which I shall at my death owe or stand indebted in to any person or persons whatsoever; also I devise all my estate in G. to R. B.*—This estate in *G.* was all the real estate the testator had. Per Lord Keeper, this will creates a charge on the real estate for payment of his debts.

Lumley
v. May,
Id. 36.

R. M. seized of freehold and copyhold land, surrenders to the use of his will, and then devises to his wife all his goods, chattels, and estate whatsoever, upon condition that she paid his debts and legacies; and by the will bequeathed 600 l. to the defendant his eldest son and heir, and 400 l. to the plaintiff his daughter, and other legacies to other people, and the surplus of his estate, after his

his wife's death, to be equally divided between his four children, and made his wife executrix, and died, leaving the defendant, his son, an infant; and the wife died before probate. This bill was brought by the creditors and legatees to have the estate sold to pay them; and the court was of opinion, that the words *goods, chattels, and estate whatsoever*, with all the other circumstances of the case, and the personal estate falling short, would pass the testator's lands well enough, and decreed a sale, and the heir to join when he came of age: but he being an infant, they gave him a day to shew cause, when he came of age.

So, where a will began, "As to all my wordly estate, *my debts being first satisfied*, I devise the same as follows:" the real estate was holden to be charged, nothing being devised till the debts are paid.

Harris v. Ingledeu, 3 P. Wms. 91.

So, where a will began, "As to my wordly estate, which it hath pleased God to bestow upon me, I give and dispose thereof in manner following: that is to say, *Imprimis*, I will that all my debts which I shall owe at the time of my decease be discharged and paid." Lord King decreed, that these words created a charge upon the real estate for such debts as the personal estate was not sufficient to pay; and this decree was affirmed in the House of Lords.

Leph v. Earl of Warrington, 4 Br. P. C. 90. Hatton v. Nicholls, Ca. temp. Talb. 110. Lypet v. Carter, 1 Vez. 499.

Earl of Godolphin v. Pennock, 2 Vez. 271. similar decisions on almost the same words.

J. J. by his will, first, orders all his debts and funeral expences to be honourably paid after his decease. In a subsequent clause he devises particular premises, (enumerating them,) excepting *H. and R.*; all which enumerated premises, except *H. and R.*, he devises to trustees, by and out of the money arising by sale, and out of the rents and profits thereof in the mean time, in the first place to pay and discharge his debts, funeral expences, and all legacies given by this will, or by other writing under his hand. He afterwards goes on and says, that *H. and R.* shall be in the first place for payment of the legacies mentioned in his will. On a bill by creditors to have the real estate by the will subjected to the payment of their debts, in aid of the personal, so far as that proved deficient, insisting, that the whole real estate was by the will established as a fund for that purpose; Sir J. Strange, M. R. said, that though on the first part of the will the court might take the whole real to be charged with debts, yet as there is no express lien on the real by these general words, and afterwards the testator distributes such part of his real estate for debts, and such for legacies, it is too much to lay hold on the general words to say, the whole should be charged with payment of debts. It can be done only by implication on the general words, which may be explained afterwards, and that implication destroyed. Consequently, the plaintiffs can only have a decree for an account of the personal estate in course of administration, and then the other parts of the real estate, except *H. and R.*, for payment of their debts.

Thomas v. Britnell, 2 Vez. 313.

But where there is a clear, full charge of the whole real estate in aid of the personal for the payment of debts and legacies, this shall

Ellison v. Airey, 2 Vez. 568.

shall not be restrained by a subsequent devise of a particular part of the real estate for that purpose, unless negative words are added.

Davis v.
Gardiner,
2 P. Wms.
187.

A will began thus: *As to my worldly estate, I dispose of the same as follows, after my debts and legacies paid*; and then gives several legacies and portions to the testator's daughters; and then says, that "*after all my legacies paid,*" the surplus of the personal estate shall go to the son. After which follows a devise of land to the son; but if he dies without issue in the life of any of the daughters, then to the daughters. There was a sufficiency out of the personal estate to pay great part, though not all of the legacies. It was holden, that the land was not chargeable to supply the deficiency.]

Vern. 104.
2 Chan. Ca.
205. S. P.
decreed.

If lands are devised to trustees for the payment of debts and legacies (a) out of the rents and profits, the trustees may sell the land itself.

[(a) But where the introductory words were, "First, I will and direct that all my legal debts, legacies, and funeral expences shall be fully paid;" it was holden, that they did not authorise the raising of pecuniary legacies out of the real estate to the loss and disappointment of specifick devisees. Keightley v. Keightley, 2 Vez. jun. 328.]

Vern. 104.
Trafford v.
Ashton,
1 P. Wms. 415.

But if the devise be to pay debts and legacies out of the annual rents and profits; by these words the land shall not be sold.

Vent. 256.
2 Vent. 357.
S. P.

If there be a devise of a sum certain to be raised out of the profits of lands, and the profits will not amount to raise the sum in a convenient time: *per* Lord Chancellor, It is the law of this court to decree a sale.

2 Vern. 26.
Berry and
Askam.

A. devises, that his executors shall receive the rents, issues, and profits of his personal estate, in the first place to pay *60l. per ann.* to one for life; and after that person's death, out of the remainder of his estate, his debts being paid, to raise portions for several children, payable at twenty-one, and maintenance in the mean time; and devises all his lands in several parcels to several persons, at future times: the Master of the *Rolls* held, that the lands were liable to be sold, and that the sales should be out of all the devisee's lands, unless the personal estate were sufficient, or the rents and profits in a reasonable time; and ordered an account to be taken thereof in the first place.

(b) Ivy v.
Gilbert, Pr.
Ch. 583.
2 P. Wms.
13. S. C.
Evelyn v.
Evelyn,
2 P. Wms.
669.
Okedin v.
Okedin,
1 Ark. 550.
(c) Ivy v.
Gilbert,
ubi supra.
Mills v.
Banks, 3 P.
Wms.
(d) Small v.

[But notwithstanding these cases, a court of equity will not decree a sale of the lands, if no time for payment (b) be appointed; or if any other mode is prescribed to satisfy the charge (c), as if the instrument contain a power of leasing, or of mortgaging the premises; or if it distinctly appear, that the rents and profits were exclusively intended to satisfy the charge (d). And so much do courts of equity respect the intention, that Lord *Hardwicke* said, (e) that "where a man creates a trust for payment of debts, and declares the trust of the term to be by perception of rents and profits, or by leasing or mortgaging, to raise sufficient money for payment of his debts, it restrains it merely to a payment of rents and profits. But if it had been a trust of the rents and profits, the term might have been sold for the satisfaction of creditors."—"But where there are other limiting words fol-

“lowing rents and profits in a trust for payment of debts, his Lordship observed, he did not remember any case which would “authorize a sale.” And this opinion seems supported by Lord *Loughborough* in the following case (*f*): *T. B.* by his will directed all his debts to be paid out of his estate with all convenient speed, and ordered his personal estate to be converted into money, and applied in aid of his real estate, in payment of funerals and debts, as far as the same would extend. In case he should die without issue, he devised his estate of *B.* (subject to the charge) to trustees in trust to pay the yearly rents and profits as follows, *viz.* in discharge of his wife’s jointure, and his sister’s annuity, and in payment of such of his debts, and the interest thereof, as his personal estate should fall short of satisfying, and subject thereto, to pay his brother *H. B.* an annuity of 100*l.* *per annum*, to continue till after his debts affecting his lands should be paid off by the rents and profits of his estate; and immediately after the payment of his debts, then 200*l.* in lieu of the 100*l.*, and an additional annuity of 50*l.* to his sister. And as to the residue of the rents and profits, he gave them to the first and other sons of *H. B.*, with remainders over. On a bill filed by the specialty creditors and annuitants against Lord *Derby* a mortgagee, and the other parties, praying an account of the personal estate, and that if it should prove insufficient to pay the debts, the deficiency might be made up by sale of the real estate; the Master of the Rolls had ordered the money for the payment of debts to be raised by mortgage; but it appearing that a sufficient sum could not be raised by that means, the question was, whether the court could, under the will, decree a sale?—By Lord *Loughborough*: Where the devise is to pay the debts out of the *profits* of the estate, it is equivalent to a devise to the trustees to sell, and a decree for a sale is only an execution of that trust. But I am afraid you will find, that both by the words and construction of the statute of fraudulent devises, where there is a devise for the payment of debts, it takes the case out of the statute, and it stands as it would have done before the statute was made: the creditor can come only as the will directs. I take it to be the clear intent of the testator here, that not an acre should be alienated for the payment of his debts; therefore, there cannot be a sale.—But it is to be observed, that Lord *Thurlow* was of opinion in a subsequent case, that in order to take a devise of real estate for the payment of debts out of the statute against fraudulent devises, it must be effective; and therefore where a testator, after generally charging his real estate with his debts, had devised a particular estate to trustees for that purpose, excepting the mansion-house, his Lordship said, that if the master reported that the debts could not be paid by the means provided in the devise, he should either here or in the House of Lords (unless the House overruled him) order the estate to be sold, notwithstanding the statute; and consider it so far as fraudulent: that in the present case, he should order the devised estate to be sold, without including the capital mansion-house, if, without it, the estate was sufficient for

Wing, 3 Br.
P. C. 503.
(e) Ridout
v. Earl of
Plymouth,
2 Atk. 104.
(f) Lingard
v. Earl of
Derby,
1 Br. Ch.
Rep. 311.

Hughes v.
Doulben,
2 Br. Ch.
Rep. 614.

for the payment of the debts; if not, the mansion-house must be sold.

In what cases a devise for payment of debts will make the estate either legal or equitable assets, see tit. *Executors and Administrators*, vol. iii. p. 59.]

(G) Of Devises by Implication.

Vaugh. 261.
1 Lev. 260.
Roll. Abr.
843.
13 H. 7 17.
b. Cro.
Jac. 75.
Horton's
case. Bro.
tit. Devise,
52.
2 Sid. 53.
2 Lev. 207.

THE law in conveying estates did not regularly suffer any to pass by implication, because it is a manner of transferring no way agreeable to the plainness and solemnity of the law; as, if *A.* surrenders to the use of *B.*, and, for want of issue of *B.*, the remainder over to *C.*; this, in a conveyance at law, had been but an estate for life to *B.*, and no estate-tail by implication. But there has been greater favour and latitude allowed in the disposition of estates by will; and in the construction of them, the judges, to support the intent of them, where it is very apparent, have admitted estates by implication, though to the disherison of the heir at law. However, in those cases, such estates have been allowed only to arise by a necessary, and not a possible implication or intention in the deviser; for the heir's title being plain and obvious, no words which will bear a contrary signification shall, by construction, impeach it.

Vide the authorities in the preceding section, and Vern. 22.
2 Vern. 572.
2 Vent. 223.
S. P. (a)

As, if *A.* devises lands to his (a) heir after the death of his wife; this is a good devise to the wife for life by implication; for by the express words of the will, the heir is not to have it during her life; and if the wife has it not, none else can, for the executors cannot intermeddle.

So, if one having a wife, and two daughters, heirs at law, devises lands to one of the daughters after the wife's death; this gives the wife an estate for life, though the daughter is but one of the coheirs. 2 Vern. 723.

Bro. Dev.
52. Cro.
Jac. 75.
Vern. 22.
2 Vern. 572.
2 Vent. 223.
Roll. Abr.
844.

But if a man devises to a stranger, after the death of his wife, this gives the wife no estate for life by implication; for it is but a demonstration when the estate of the stranger shall commence.

So, if a man devises his *term* to his son, after the death of his wife; this raises no estate for life in the wife by implication; for here is no necessary implication, that the wife shall have it as in the former case, because the son is not by law to have the term, as the heir at law is to have the inheritance, without a particular devise, but the executor: and therefore the term in this case may go to the executor during the life of the wife.

Tyte v.
Willis,
Ca. temp.
Talbot. 1.

[So, on the other hand, if an estate is devised to *A.* and his heirs, it shall not be controlled and cut down to an estate-tail in respect of the words, "and if he die without heirs, remainder to *B.*," if *B.* is a stranger and cannot be heir to *A.*

Higham v.
Barker,
Cro. Eliz.
16.

If an estate be devised to *A.* and the heirs male of his body, and if he die without issue of his body, remainder over; and *A.* die

die without issue male, having issue *female*; no estate will arise to such issue *female* by implication.]

Moor, 124.
Lady Lancf-
borough v.
Ambl. 478.

Fox, Ca. temp. Taib. 262. Bodens v. Watfon,

If a man devises land to *J. S.* and his heirs, after the death of *J. D.*, or after twenty years, and the devisor dies during the life of *J. D.*, or before the twenty years expired, the land in the *interim* shall descend to the heir at law; for during this time the devisor has made no disposition of it, but left it to descend according to the rules of law, which carry it to the heir.

Roll. Abr.
844.

Where a man devised all his pasture lands in *D.* to his youngest son, and also willed that all bargains, grants, &c. which he had from *C.*, should be to his youngest son, and the heirs of his body; it was resolved, that the youngest son should not have an estate-tail in the pastures of *D.* by implication; for the words of a will to disinherit the heir at law, must have a clear and apparent intent; and this at most could have been but a possible implication, that the devisor might have intended the son an entail in the pastures, which is not sufficient to destroy the plain title of descent to the heir at law.

Vaugh. 262.
Cro. Car.
368.

A. leases, upon condition, that the lessee shall not alien to any besides his children; the lessee deviseth the term to *H.* his son, after the death of his wife: it was adjudged, that this devise was no breach of the condition, for the wife took no estate by implication; for there can be here but a possible implication at most; and since the intent of the devisor is the best rule to construe wills by, it would be absurd to say, that the devisor intended to convey such an estate as must forfeit his own; therefore, the executor shall have it (*a*) while the wife lives.

Cro. Jac. 75.
Vaugh. 266.
Roll. Abr.
844.
(a) If a term be devised to executors after the death of the wife:
Quære, Whether

she shall have an estate for life, or shall the executors have it during her life, to perform after her death as legatees? *Vide* Cro. Jac. 75. Vaugh. 261.

his will, and

A. seised of a manor, part in demesne and part in services, devised all the demesne to his wife expressly, for her life, and all the services, for fifteen years, and then devised the whole manor to a stranger after her death: it was resolved, that the last devise should not take effect till after her death, and yet she should not have the services for her life by implication, but that the heir should enjoy the services after the fifteen years, while she lived; for there appears no necessary implication that she should have the whole for her life, with an exclusion of the heir; and a possible implication is not sufficient to exclude him; for nothing but the apparent intent of the devisor can do that: but if the devisor had said, that after the death of his wife and the stranger, the heir should have the manor, there, the wife by a necessary implication shall have the whole manor while the stranger and wife live, and the stranger cannot take any thing whilst she lives.

Moor, pl.
24.
Vaugh. 265.

From this it appears that the rule, *viz.* where a devisee takes any thing by an express devise, he shall not have any other thing devised by the same will by implication, is destroyed by the distinction of a necessary and a possible implication; for the former case proves, that a necessary implication will give an estate, though

Cro. Eliz.
10.
Vaugh. 263

the devisee took by an express devise before; and a possible implication is sufficient in no case to convey an estate to the disheirson of the heir; for that is the principal point between *Gardner* and *Sheldon*, in *Vaugh.* 263. where the words of the will are, that if my son *G.* and my daughters *M.* and *K.* die without issue of their bodies, then my lands to remain to my nephew *W.*, it was adjudged, that the devise to *G.*, being son and heir, was void, and that the daughters took no estate by that possible implication; but their dying without issue is only a designation of the time when the nephew is to take.

3 Lev. 259. *A.* devised to his wife 600 *l.* to be paid to *J. S.* for the payment of lands he purchased from him, and are already settled on her for her jointure; the lands were not settled on her; and adjudged they did not pass by the will by implication, for there appears no intent that she should have them by the will, and, consequently, they cannot pass from the heir at law by implication, since the deviser was only mistaken as to the settlement of them in his lifetime.

Chan. Ca. 196. North and Compton, *vide* head of Uses and Trusts, of Trusts by Implication. *A.* devised all his estate real and personal for the payment of debts and legacies, and devised 100 *l.* to his heir at law: this was decreed a good devise in fee, but no implied trust arose to the heir at law for the surplus; for by that construction the devisee would have no benefit by the devise: besides, the legacy of 100 *l.* to the heir at law is in this case an exclusion of the heir from any further benefit.

4 Leon. 14. *A.* has two sons *B.* and *C.*, and devises part of his land to *B.* in tail, and the other part to *C.* in tail; and if any of his sons died without issue, then the whole land should remain to a stranger in fee; *C.* died; yet the stranger could not enter into his part, for the other brother took it by implication, the words of the will being, that the whole land shall remain to a stranger, which he cannot have while either of the sons or any issue of their body be living.

Vide supra, letter (D). Dyer, 171. a. Bendl. pl. 114. Moor, 113. 2 Leon. 226. Vent. 230. [(a) Although the rule here laid down, that an estate expressly devised by the testator shall not be enlarged by implication, be generally true; yet if the manifest general intent of the testator require it, courts of justice will, in order to effectuate such general intent, disregard the particular intent, however expressly declared, if inconsistent with the general intent.] Another rule relating to devises by implication is this, that where the devisee takes a particular estate of inheritance by express words in the will, such estate shall not be enlarged by implication (a); for since devises by implication are allowed in favour to wills, that where the intention of the testator may be presumed, the judges will pursue it, though it be not expressed in plain words, yet there is no room for such construction where the devisee has an estate given him by express words in the will; for that would be to over-rule the plain meaning of the testator against his own words: therefore, if *A.* devises to *B.* for life, the remainder to *C.*, and the heirs male of his body, and if it happens that *C.* shall die without heirs of his body, then the remainder to *D.*, this is but an estate in tail-male to *C.*, because that estate being given to him by express words, ought not to be over-ruled by a bare implication, that the testator intended him a greater estate by the words, *if he* chance to die without heirs of his body.

the manifest general intent of the testator require it, courts of justice will, in order to effectuate such general intent, disregard the particular intent, however expressly declared, if inconsistent with the general intent.

intent. See the case of Doe v. Applyn, 4 Term Rep. 82. Robinson v. Robinson, 1 Burr. 44. and other cases *supra* D. and see 2 Eq. Tr. 58. note (b) by Mr. Fonblanque.]

If a devise be to *A.* and his heirs male, and if he die without heirs of his body, then to remain to *B.* in fee, this is but an estate in tail-male to *A.*, for the law supplies the words *of his body*; and since the devisor only gave it by (a) express words to him and his heirs male, it would be against his plain words to let in his issue female by implication on the other words, *if he die without heirs of his body*.

heirs, these last words will not, against the express declaration of the testator, give the devisee a fee simple by implication. 2 Vern. 451.

B. having issue a son and two daughters by several venters, the son died leaving two daughters, and then *A.* devises one of his messuages to *B.* his own daughter, and her heirs for ever, and his other messuage to *C.* his daughter, and her heirs for ever; and if *B.* die without issue, living *C.*, then *C.* should have *B.*'s part to her and her heirs; and if *C.* die before her age of sixteen years, then *B.* should have her part in fee; and if both his said daughters should die without issue of their bodies, then his grand-daughters should have the messuages: *C.* died without issue, having passed her age of sixteen years: the grand-daughters had judgment for her part; and the words of the will, *if his two daughters died without issue of their bodies*, did not create cross remainders for each other's part by implication, but only denoted the time when the heirs at law should have the messuages; for, says the book, no such implication will serve when there is an express gift and limitation made to the devisees by the testator himself.

and *respective* severing the title; see Davenport v. Oldis, 1 Atk. 579. Williams v. Browne, 2 Str. 996. Pery v. White, Cowp. 777. Phipard v. Mansfield, Id. 800.—With respect to cross remainders in a will, it may be observed, that the presumption is in favour of them, where they are to be raised between two; but where between more than two, it is against them. But it being only a presumption, it may, of course, be rebutted in either case by circumstances of plain, manifest intention. The words "*in default of such issue*," and a devise over of all the testator's estates, have been holden to raise cross remainders. Phipard v. Mansfield, *ubi supra*. Comber v. Hill, 2 Str. 969. Atherton v. Pye, 4 Term Rep. 710. Wright v. Holford, Cowp. 31. S. C. by the name of Wright v. Enfield, Amb. 468. and by the name of Wright v. Lord Cadogan, 6 Br. P. C. 156. Holmes v. Willet, 1 Freem. 483. Marryatt v. Townly, 1 Vez. 102. The presuming against cross remainders between more than two, was for a technical reason, because the law avoids the splitting of tenures. 1 Vez. 104-5. *per* Lord Hardwicke.]

[Where an express estate-tail is given by the will, it will not be enlarged to a devise in fee by implication, from the land's being charged with the payment of annuities, or of a gross sum, not even if it be a charge in fee; for the charge in such case shall issue out of the whole estate, and not out of the particular estate only; and being governed by the directions of the will, it shall take effect according to the limitations thereof, and affect the whole inheritance.]

(H) Of the Disposition of Goods and Chattels by Will, by what Description, and to whom good.

[See under the division *Legacies*, B. 2, 3.]

(I) Of executory Devises of Lands of Inheritance :
And herein of Contingent Remainders, and Cross
Remainders, as far as they relate to this Place.

Abr. Eq.
126.

(x) Of which
there are

three kinds : 1. Where the devisor departs with his whole fee-simple, but upon some contingency qualifies that disposition, and limits a fee upon that contingency, which is new in law, as appears by Brook, 234. Dyer, 33. Vaugh. 271., and was first advanced in the case of Hind and Lyon, 19 Eliz. 3 Leon. 64. *per* Nottingham. 3 Chan. Cases, 1. &c. in the case of the duke of Norfolk. Second sort is, when the devisor gives a future estate to arise upon a contingency, but does not part with the fee a present, but suffers it to descend to his heir, as a devise to the heirs of J. S. till he shall have one, &c. and these have been frequent. Of the third sort are leasehold interests, or terms for years, for which *vide infra* letter (K), and Salk. 225.

Fearne's
Executory
Devises,
4th ed.
3, 2, &c.

[This is the definition commonly given of an executory devise. But it has been objected to as defective in point of accuracy and precision, inasmuch as it is not confined to executory devises only, but embraces every kind of contingent interest in lands given by devise, and some contingent interests by devise are contingent remainders. An executory devise is, strictly, such a limitation of a future estate or interest in lands or chattels (though in the case of chattels personal, it is more properly an executory *bequest*) as the law admits, in the case of a will, though contrary to the rules of limitation in conveyances at common law. It is only an indulgence allowed to a man's last will and testament, where otherwise the words of the will would be void ; for wherever a future interest is so limited by devise, as to fall within the rules which the law has prescribed for the limitation of contingent remainders ; such an interest is not an executory devise, but a contingent remainder.]

Dyer, 41.
Co. 85.
Plow. 29.
2 Leon. 69.
Co. Lit. 19.
Poph. 34.
2 Roll.
Rep. 220.
Godolp.
355.

To understand this doctrine, it must be observed as an established rule, that a fee cannot be limited on a fee ; as if lands are limited to one and his heirs, and if he dies without heirs, they shall remain over to another, this last limitation is void : so, if lands are given by deed to one and his heirs, so long as J. S. hath issue, and after the death of J. S. without issue, to remain over to another, this remainder is likewise void, because the first devisee had a fee, though it was a base and determinable fee.

Cro. Eliz.
205. Roll.
Abr. 626.
Dyer, 124.
(b) All the
candles must
be lighted,
and burning

Yet, in a will, such limitations may be good upon a contingency that may happen within the compass of a life or lives in (b) *esse*, or nine months after the expiration of a life, or (c) a reasonable number of years ; for these tend not to a (d) perpetuity, which is so odious in law ; but this not by way of direct (e) remainder, but by way of executory devise.

out at the same time, *per* Twifden. (c) That 20, nay 30 years have been thought a reasonable time. Salk. 229. pl. 8. (d) As the case of Gardiner and Sheldon does, which therefore has been denied to be law, which *vide* in Vaugh. 271. (e) Where a contingent estate is limited, and depends upon a leasehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder. 2 Sand. 380. Purcfoy and Rogers. 3 Lev. 434. S. P. Carth. 310. [Doe v. Holmes, 3 Will. 237. 241. 2 Bl. Rep. 777. S. P. Goodtitle v. Billington, Dougl. 753. Doe v. Morgan. 3 Term Rep. 763. S. P. Walter v. Drew, Com. Rep. 372. S. P. Wealthy v. Bosville, Ca. temp. Hardw. 258. S. P. Carwardine v. Carwardine, Fearne's Executory Devises, 4th ed. 5.

As, if tenant in fee-simple devises his land to *A.* and his heirs, and if he dies without issue in the life of *B.*, then to *B.* and his heirs; though this be a limitation of a fee-simple upon a fee; yet, because the remainder to *B.* must vest upon a contingency, which will fall in a life, it has been held good as an executory devise. 3 Chan. Ca. 9.

So, in the celebrated case of (*a*) *Pell* and *Brown*, where one having three sons, *A.*, *B.*, and *C.*, by his will in writing devises lands to *B.*, his second son, and his heirs for ever, paying 20*l.*, and if *B.* dies without issue, living *A.*, then *A.* to have those lands to him and his heirs for ever; *B.* enters and suffers a common recovery to the use of himself and his heirs, and then devises those lands to *J. S.* and his heirs, and dies without heirs, living *A.*: it was adjudged, first, that *B.* had a fee-simple, and yet the limitation to *A.* good, as an executory devise in fee; for it was to happen within the compass of a life; and therefore if *B.* died with issue, living *A.*, or without issue, after the death of *A.*, then this future interest was never to arise: secondly, it was adjudged, that this being a mere collateral possibility was not bound by the recovery; for it had not existence at all when the recovery was suffered; and therefore the recompence in value could not extend to it: besides, to allow the particular tenant to destroy any such future interest, would be the means of frustrating the most commendable intentions of the devisor, providing for his younger children, or for the payment of his debts, &c. (a) Reported Cro. Jac. 570. Roll. Abr. 611. Palm. 131. 2 Roll. Rep. 216. 2 Leon. 111. Vaugh. 272.

One by will devises his lands to his mother for life, and after her death to his brother in fee, provided that if his wife (being then *enspent*) be delivered of a son, that then the land shall remain to him in fee, and dies, and the son is born: it was held, that the fee of the brother should cease, and vest in the son by way of executory devise upon the happening of the contingency. Dyer, 127. in margine.

[A testator devised lands to his wife for life, and after her death to such child as she was then supposed to be *enspent* with, and to the heirs of such child for ever; provided that if such child as should happen to be born, should die before the age of 21 years, leaving no issue of its body, the reversion should go over. The court held it to be a devise to the wife, remainder to the child in contingency in fee, with a devise over, which they held a good executory devise, as it was to commence within twenty-one years after a life in being; and that if the contingency of a child never happened, then the last remainder was to take effect upon the death of the wife: that the number of the contingencies were not material, if they were all to happen within a life in being, or a reasonable time after. Gulliver v. Wickett, 1 Will. 105.

So, where a testator devised to his wife for 3 years, remainder to his son for 99 years, if he should so long live, remainder to him for 99 years, if such wife as he should marry should so long live, remainder to the *heirs* of his son's body, and the heirs of their bodies; the court held the devise to the *heirs* of the son's body good, as an executory devise, being to take place *in futuro*, within the compass of a life in being. 1 Will. 225. Doe v. Carleton.

Harris v.
Barnes,
4 Burr.
2157.

Again, where a testator devised his lands to *C.*, for the term of 90 years from his (the testator's decease) if he should so long live, and after the determination of that term, he devised the lands to the *heirs of the body of the said C.* remainder over; upon a question referred to the judges of *K. B.*, whether the heirs of the body of *C.* took any and what estate under the will? they certified their opinion, that the clear manifest intent of the testator was to give an estate-tail to such person as *should be heir of the body of C. at his death*, (the only determination of the 90 years term in the testator's view,) *to him and to the heirs of the body of the said C.*, with remainder over as in the will; which intent of the testator might by law take effect as an executory devise, for the contingency must happen within the compass of a life in being; and the freehold in the mean time being undisposed of, descended to the heir at law.]

Palm. 135.
Dyer, 33.
in margine.
Cro. Eliz.
359. Cro.
Jac. 592.
(*u*) So, if a
devise of
borough-
english
lands had
been to the
eldest son,
paying such
a sum to the
younger
sons, and in
default of

One having issue *A.*, his only daughter and heir apparent, by will devises lands in *D.* to her and her husband, and her heir, upon condition that they should assure lands in fee to his executors and their heirs, to perform his will; and if they failed, then he devised the said lands in *D.* to his executors and their heirs, and died: it was adjudged to be no condition; (*a*) for then by the descent to the daughter being heir, it would be destroyed; but it was held a limitation, or an executory devise to his executors, in case the assurance was not made, and that they might, for breach thereof, enter and sell; for though a fee cannot be limited upon a fee absolute, yet upon a fee determinable it may, and ensures as a new original devise to take effect when the first devisee fails to make the assurance.

payment, that the land should go to them and their heirs; though the word *paying* in a will amounts to a condition, yet because that must descend to the devisee as heir, and no one else can take advantage of his default, it must be an executory devise, to vest in default of payment by the eldest. 3 Co. 21. a.
Cro. Eliz. 833. Hansworth and Pretty.

Cro. Eliz.
878.

[(*b*) It is
inaccurate
to call it a
remainder,
for the rea-
son assigned for the judgment proves the limitation was allowed to operate as an executory devise.
Fearn's E. D. 4th ed. 25.]

If *A.* devises lands to *B.* for five years from *Michaelmas* following, the remainder to *C.* and his heirs, this is a good remainder (*b*) although it cannot vest before the particular estate begins, and the freehold cannot be in expectancy, for in the mean time the fee shall descend to the heir.

3 Roll.
Rep. 197.
Palm. 132.
[Thrustout
v. Denny,
1 Will. 270.
S. P.]

One devises lands to his wife till his son came to the age of 21 years, and then that his said son should have the lands to him and his heirs, and if he dies without issue before his said age, then to his daughter and her heirs: this is a good contingent or executory devise to the daughter, if the contingency happens, and in the mean time the fee descends to the son as heir; and if he lives to 21, though he after die without issue, or leave issue, though he die before 21, yet the daughter is not to have the lands, because he is to die without issue, and before 21, else the daughter cannot take.

Cro. Car.
185. Spald-
ing and

But where one having issue three sons, *A.*, *B.*, and *C.*, devises to his son *A.* after the death of his wife, to him and the heirs of

his

his body lawfully begotten in fee-simple; and if he die in the lifetime of my wife, that then my son C. shall be his heir, and dies; A. hath issue, and dies, in the lifetime of the wife; it was adjudged, that the issue should have the land after the death of the wife, and not C.; for it was in effect a devise to the wife for life, remainder to A. in tail, remainder to C. in fee, upon the contingency of A.'s dying in the life of the wife, and does not abridge the estate tail, expressly given A. by his dying in the life of the wife.

Spalding,
Sa. C. cited.
3 Lev. 434.
Ld. Raym.
524.

[A devise was to two trustees and their heirs to receive the rents until B. should attain 21; and if B. should attain 21 or have issue, then to B. and the heirs of his body, but if B. should happen to die before 21 and without issue, remainder over; B. attained his aged of 21, and afterwards died without issue: Lord Hardwicke, considering the word *and* as used for *or*, and the condition as disjunctive instead of copulative, decreed that the remainder over should take effect, upon the apparent intent of the testator, that it should take place, either in default of B.'s attaining 21, or on his dying without issue.

2 Vez. 243.
Brownfword
v. Edwards.

A *feme covert*, pursuant to a power, left her husband the profits of certain estates for life, and after his death her estates to her children, if she should leave any to survive her; but in case she should leave no such child or children, nor the issue of such child or children, after the decease of her husband, she gave the estates to J. K. making him her sole heir in default of issue left by her. Lord Hardwicke held, that the children took estates-tail, and not in fee, and that the devise to J. K. was a *vested remainder*, and not a limitation to take effect only on the event of the testatrix's dying without leaving any child or the issue of any living at her decease. He said the testatrix had only expressed the double contingency, which there is in the case of every limitation in remainder after an estate-tail, viz. there being no issue at all, or all such issue dying without issue.

Southby v.
Stonehouse,
2 Vez. 610.

But where a testator devised to B. his son and heir, and if he died before 21, and without issue of his body then living, the remainder over, &c. and B. survived the 21 years; it was held, that he had a fee-simple immediately, and that the estate-tail was to arise upon a contingency which never happened, as he attained 21. So, where the testator devised land to his wife till his son came to his age of 21 years, and then that his son should have the lands to him and his heirs, and if he died without issue before his said age, then to his daughter and her heirs; it was held to be an executory devise to the daughter, if the contingency happened; and that in the mean time the fee descended to the son, and if he attained 21, though he afterwards died without issue, or if he should leave issue, though he died before 21, yet the daughter was not to have the lands; because he was to die without issue, and before 21, to entitle her.]

Collinson v.
Wright,
1 Sid. 148.

1 Eq. Abr.
188. pl. 80.

And vide
Barker v.
Suretees,
2 Stra. 1175.

Baron and *feme* being seised of a copyhold, to them and the heirs of the *baron*, baron surrenders it to the use of his will, and then devises it to the heirs of the body of the *feme*, if they attain the age of 14, and dies without issue, and then she marries a second

1 Lev. 135.
Snow v.
Cutler.
Eq. Ca.
Abr. 188.

husband and has issue that attains the age of 14, and then she dies; and whether this was a good devise, by reason of the double contingency, *scilicet*, the having heirs of her body, and that such heir should live till 14, was doubted; but it was admitted that if the devise was good, it must be by way of executory devise, which is allowable, when to take effect within the compass of a life, but not after a dying without issue; for that tends to a perpetuity: and it cannot take effect by way of remainder; for it is a new devise to take effect after her death, and is not as a remainder joined to her estate: but the court being divided upon the point of contingency, it was agreed to be adjourned into the Exchequer-chamber, and the reporter supposes the parties agreed afterwards, for he heard no more of it.

2 P. Wms.
28. Gore
v. Gore.

[Where *A.* devised his lands to trustees for 500 years upon trusts, and after the determination of that term to the first son, &c. of *B.* (who had no son born at the testator's death), this executory devise to the unborn son of *B.* was held good; because it was clear the freehold must vest, either on the birth of such son, or on *B.*'s death without having had any son.

Prec. Chan.
67. Fairfax
v. Heron.

So, where one devised all his lands after the death of his executor, to *A.* his executor's son, and his heirs for ever, but if *A.* died leaving no son, then to that son of his executor, to whom he should think fit to give them by his will; and for want of a son of his executor, then to *B.*; it was held a good executory devise to *B.* as confined to the period of a life in being.

Loyd v.
Carew.
Chanc.
Prec. 72.
Show. Parl.
Cas. 137.

Where lands were limited by marriage settlement to the use of *A.* and his wife, for their lives, remainder to trustees and their heirs during the lives of *A.* and his wife, to preserve contingent remainders; remainder to the first and other sons of the marriage successively in tail-male, remainder to the right heirs of *A.*; with a proviso, that if the heirs of the wife should within twelve months after the death of the survivor of the husband and wife, pay 4000*l.* to the heirs or assigns of the husband, that then the fee should remain to the use of the heirs of the wife: the House of Lords held this executory limitation of the use to the heirs of the wife to be good.

10 Mod.
419. Marks
v. Marks.
Strange,
12*j.*

So, where a testator devised to his wife for life, remainder to *C.* his second son in fee, provided if *D.* his third son should, within three months after his wife's death, pay 500*l.* to *C.* his executors, &c. then he devised the same lands to *D.* and his heirs; it was adjudged a good executory devise to *D.*]

2 Mod. 289.
Taylor and
Biddulph.
Abr. 19.
188. [S. C.
cited and re-
cited upon by
the judges
in Ca. temp.
1 Alb. 252.]

If a man having only one sister and heir, who had issue *A.* and after married *B.* by whom she had issue *C.* and *D.* devises lands to his sister until *C.* attains 21, and after *C.* attains that age, to *C.* and his heirs; and if *C.* dies before 21, then to the heirs of the body of *B.* and their heirs, as they shall attain their respective age of 21, and dies, *C.* dies before 21, living *B.*, and after *B.* dies, *D.* either as heir of *C.* in whom the fee was vested, or as heir of the body of *B.* (though he could not be so during the life of *B.*) being of age after the death of *B.* shall have the estate by way of executory devise, and not the right heir of the deviser.

[So,

[So, where the testator devised lands to his grandson *W.* and his heirs, and if *W.* should die under age, then to his grandson *T.* and if *T.* should die under age, then to such other son of the body of his daughter *M. S.* by his son-in-law *T. S.* as should happen to attain his age of 21 years, remainder over; and the testator died leaving two grandsons *W.* and *T.* who both died under age; afterwards another son *A.* of the body of *M. S.* by *T. S.* was born; it was decreed a good executory devise to this after-born son *A.* if he should attain his age of 21 years.

Caf. temp.
Tal. 229.
Stephens v.
Stephens.

Where *A.* devised to *B.* his son all his estate until *C.* should attain his age of 21 years, and no longer; and afterwards said, *Item*, I give and bequeath unto *C.* all my messuages in *H.* and *T.* for ever, that is, if he have a son or sons (who shall attain 21); but if my kinsman *C.* shall chance to die without son or sons to inherit, my will is, that the son of my son *B.* shall inherit; *C.* took an estate in fee at 22 years of age, subject to be defeated by an executory devise over, which was not confined to vest on the death of *C.* if he left issue, but awaited the event of that issue dying under 21, which could not be decided until a period of 21 years after a life in being.

Heath v.
Heath,
1 Br. Ch.
Rep. 147.

It is the same in regard to personal estate. For where the testator bequeathed the residue of his personal estate to his niece *A.* for life, and after her death the interest to be applied for the maintenance of such children as she should have, until the sons had attained 21, and the daughters 18 years of age, and at such their ages, to be paid their portions, and *for want of such issue*, then to the children of *S.*; the niece died without issue, and it was contended that the bequest over to the children of *S.* was too remote; for if the words *for want of such issue* should signify for want of such children of *A.* as should attain the said ages, yet it would exceed the rule which had confined these sort of bequests (especially of mere personal estates) to lives in being: but Lord Chancellor *King* held it to be a good executory devise, and cited the case of *Maffenburgh v. Ash*, where the like executory devise of a term for years was held good.

Madox v.
Staines,
2 P. Wms.
421.

So, where the money in the orphan's fund and bank stock was limited by the testator in trust for such of his brother's children then unborn as should attain their ages of 21; it was adjudged a good executory devise.

Maffen-
burgh v.
Ash, 1 Vern.
234-257.
304.
Caf. temp.
Tal. 245.
Sabbarton v.
Sabbarton.

An estate by way of executory devise may be so limited, as that its taking effect or not may depend upon the act of the owner of the fee, which precedes it. Thus, *W.* by will devised his estates in *B.* except, &c. to his son *F.* and his heirs, &c. and the rest of his estates to his son *C.* and his heirs, &c.; and if either *F.* or *C.* should die without having settled or otherwise disposed the estates so devised, or without leaving issue of his or their respective body or bodies lawfully begotten, or having such issue, such issue should die before his or their age or ages of 21, and without leaving lawful issue, he willed that the premises so given to such of his sons *F.* and *C.* so dying, should go, and he gave the same unto the survivor of them, his heirs, &c. for ever; and if

Beachcroft
v. Broom,
4 Term
Rep. 440.

the

the survivor should die without having settled or otherwise disposed thereof, or of the estates thereby originally devised to him, or, &c. and his son *W.* should then be dead without issue, then he gave such of the said devised premises as should not have been settled or disposed of as aforesaid, unto the right heirs of *G.* then deceased, in fee. *F.* died without issue, *C.* by lease, release, and recovery, conveyed part of the estate so limited as above mentioned to *I. S.* in fee, and then died; after which *W.* died without issue. And the question was, whether under the devise to *C.* and the conveyance by him, *I. S.* took an absolute and indefeasible estate of inheritance in fee-simple? And it was held, first, that on failure of the first limitation, the second might have taken effect, as an executory devise. Secondly, that the testator had in express terms given one estate to one son and his heirs, and another to another son and his heirs, and if either of them died, without having settled or disposed of his estates, or without issue, then that it should go over; that this was a lawful intention; and that *C.* having settled and disposed of the estate given to him, had thereby defeated the limitation over.]

Lev. 11.
Holmes and
Plunkett.
Ld. Raym.
2 S. 47.
Keb. 29.
119.

If *A.* hath issue two sons, viz. *B.* and *C.* and devises lands to *B.* for life; and if he dies without issue living at his death, that then the fee shall remain to the heirs of *B.* for ever, by which devise *B.* has only an estate for life, the remainder to his heir not executed; and though the reversion descend on *C.* as heir of *A.*, yet it drowns not the estate for life, against the express devise and intention of the will, but leaves an opening, as it is termed, for the interposition of the remainder, when it shall happen to interpose between the estate for life and the fee; and this being a contingent remainder, and not an executory devise, will be barred by a recovery suffered by *B.*

2 Sand. 380.
Purfoy and
Rogers.
4 Mod. 284.
2 Lev. 39.
3 Keb. 11.
3 Salk. 299.

If one devises lands to his wife for life, and if she hath a son, and causes him to be called by the christian and surname of *Sampson Shelton*, then after her death devises the same to her son, and if he dies before 21, to the right heirs of the devisor, and dies; and after the wife marries *Broughton*, by whom she hath a son, which she caused to be christened *Sampson Shelton*, &c. the devise is good by way of contingent remainder, but not by way of executory devise; for when a contingent estate is limited, and depends upon a freehold, which is capable of supporting a remainder, it shall never be construed an executory devise, but a contingent remainder; adjudged, and that the reversion descending to the heir of the devisor till the contingency happened, by the bargain and sale, and fine thereof, by the heir of devisor to *B.* and his wife, and their heirs, before the birth of their son, the contingent remainder was destroyed.

Salk. 226.
pl. 4.
Goodright
and Cornish.
Ld. Raym.
3. Skin.
408. pl. 3.
4 Mod. 255.

A. having two sons *B.* and *C.* devised lands to *B.* for 50 years, if he should so long live, and for my inheritance after the said term I devise the same to the heirs male of the body of *B.* and for default of such issue then to *C.* And the court resolved, 1st, that *B.* had not an estate-tail by implication upon the words *without issue*, because the devisor had given him an estate for years by express

press words, and the court cannot make such a construction against express words, when thereby they would drown the estate for years, and make an estate of inheritance. 2dly, The court held this devise to the heirs male of the body of *B.* to be void in its creation for want of an estate of freehold to support it; and they seemed not to think it an executory devise, because it was limited as a remainder, and because it was limited *per verba in presenti*; for if one devises his estate to the heir of *J. S.* and *J. S.* is living, the devise shall not be construed an executory devise, and such devise is therefore void; but if it were to the heir of *J. S.* after the death of *J. S.* that is good as an executory devise. 3dly, The court held the limitation to the heirs of *B.* was become void by the event, whatever it was in its creation, because *John* is now dead without issue. 4thly, The court held, that if the remainder to the heirs male of *B.* was void in point of limitation, then the next remainder limited to *C.* took effect presently.

C. seised in fee devised to trustees for 11 years, and then to the first son of *A.* and the heirs male of his body, and so on to the second, third, &c. sons in tail male, provided they the said sons shall take on them my surname; and in case they, or their heirs, refuse to take my surname, or die without issue, then I devise my land to the first son of *B.* in tail male, provided he take my surname; and if he refuse, or die without issue, then to the right heirs of the devisor. *A.* had no son at the time of the devise, and died without issue, and *B.* had a son who was living at the time of the devise, who took the surname of the devisor. The whole court agreed, that the devise to *B.* was not a contingent remainder, because of the precedent estate for years, which could not support it; it appears likewise by the case, to be the opinion of *Treby*, *C. J.* and *J. Powell*, that it could not be good as an executory devise, if it were considered as a devise to the heirs of *A.*, being limited *per verba de presenti* (a); but *Blencow*, *Just.* held, that the devise to the son of *A.* was future; for he supposed the testator knew that *A.* had no son, and the rather because he does not name him; but it was adjudged in *C. B.* and affirmed in *B. R.* that the remainder to the first son of *B.* was good, and vested in him.

[Tenant for life, remainder to his wife for life, remainder to his own right heirs, devised in manner following: "*Item*, My lands at *W.* my wife is to enjoy for her life; after her decease, of right it goeth to my daughter *E.* for ever, provided she hath heirs; if my said daughter *E.* should die before her mother, or without heirs, and my said wife should marry again and have an heir-male, I bequeath him all my right to that estate; not thinking I can sufficiently reward her love: if my said wife marieth again and fails of heir-male, after her decease and my daughter's, she failing of heirs, I bequeath 50*l.* per annum of that estate to my brother *J.* and his heirs for ever." The testator died, the wife married again, and had issue-male, afterwards the daughter died without issue. Upon a question whether the heir at law of devisor, or the heir-male of the wife was entitled

S. C.
12 Mod. 53.
S. C. cited
in 2 P. Wms.,
56.

Salk. 229.
pl. 8. Scatterwood
and Edge.
12 Mod.
278. S. C.
[(a) In the
case of a future
limitation to the
unborn
children of
the testator's
grandson,
Lord Talbot
thought its
being limited
per verba de presenti
no objection
to its taking
effect as an
executory
devise.
Chapman
v. Blissett,
Ca. temp.
Talbot. 150.]

Wright v.
Hammond.
1 Str. 427.
2 Eq. Abr.
338. pl. 11.
Vin. vol. 8.
p. 110.
pl. 32.

titled to the estate? the court held the former part of the will to be no devise, but only a declaration how the estates were settled; and therefore there being no particular estate to support the limitation to the heirs-male of the wife, it could not enure as a contingent remainder; if it were an executory devise, it must either be to take effect on the daughter's dying before her mother, and without heirs (by taking the word *or* for *and*, and so construing it copulatively), in which case the condition had not happened, because the daughter survived the mother; or else it was to take effect in either of the events of the daughter's dying before the mother, *or* her dying without heirs: now one of these events had failed, because the daughter survived the mother, and the limitation upon the other, *viz.* of the daughter's dying without heirs, was too remote.

2 Burr. 873.
Goodman
v. Good-
right.

A. upon the marriage of her niece *B.* covenanted to settle lands (at or after such time as *C.* the husband of her niece should settle his estate to the same uses) to the use of herself for life, remainder to trustees for 200 years, remainder to *C.* for life, remainder to trustees to preserve contingent uses, remainder to *B.* for life, remainder to the first and other sons of *C.*, upon the body of *B.* in tail successively, remainder to the first and other daughters of *C.* upon the body of *B.* in tail successively, remainder to the right heirs of *A.* Afterwards, and before any settlement was made, *A.* by her will reciting the articles, and that she had agreed to settle the lands in manner aforesaid, devised the said lands, &c. and the *absolute inheritance* thereof, to the use and behoof of *the heirs of the body* of the said *B.* by any other husband to be begotten, and for want of such issue, to the use of her nephew *L.*, and the heirs of his body, with several remainders over; remainder to her own right heirs. *A.* died seised; *C.* and *B.* his wife entered and suffered a common recovery, in which they were vouched; the uses of the recovery were to *C.* for life, remainder to *B.* for life, remainder to trustees to support contingent remainders, remainder to the first and other sons of *C.* and *B.* successively in tail-male, remainder to the daughters in like manner, remainder to the uses to be jointly appointed by *C.* and his wife, remainder to the right heirs of *B.* *B.* died without issue, afterwards *C.* died; and the question was betwixt the heir at law of *B.* and the daughter of *L.*

The points upon which this question depended were; 1st, Whether the will was to be taken as an execution of the articles? 2^{dly}, If not, whether the estate to the *heirs of the body* of *B.* by another husband should be tacked to the estate given her by the articles? 3^{dly}, Whether the devise to the *heirs of the body* of *B.* by any other husband was not absolutely void, being a devise *in verbis de presenti* to a person not *in esse*; and if so, whether *L.* did not take immediately, as much as if there had been no preceding devise; or at least, whether the preceding devise to the heirs of the body of *B.*, by any other husband, ought not to be laid out of the case, having become void in the event, since the event of her having issue by any other husband never happened?

After this case had been very fully argued, the court resolved, that if the will should be taken as an execution of the articles, and

as an actual devise of the particular estates, according to the limitation contained in the articles, then the subsequent limitation to the heirs of the body of *B.* by a second husband, would vest in her as an estate-tail (in remainder), and, consequently, the recovery by her and her husband had barred the subsequent limitation to *L.* But that it was unnecessary to enter into the question, whether the articles and the will could be *tacked together*? because if a devise of the particular estates expressed in the articles could not be implied by construction, *supposing the devise to the heirs of the body of B. by a second husband to be void*, the limitation to *L.* and the heirs of his body could not be a contingent remainder (for want of a preceding estate). And it was too remote as an executory devise: being not to take place till after an indefinite failure of issue of the body of *B.*; and being too remote in its creation, the event could not vary the construction: so that the death of *B.* without issue, could make no difference in the case. Therefore either way, *L.* could have no title, unless it were considered as a *present immediate devise* to him. But the court held that neither the words nor the nature of the provision would admit of that construction: and that it could not be imagined that *A.* intended to exclude the issue of her favourite niece *B.*, in order to prefer *L.* and his issue (*a*).

(a) It appears from a note in Dougl. Rep. 507. extracted from a copy of Lord Kenyon's note of this case, that this decision in the case of Goodman v. Goodright, went upon the alternative, either of the niece having taken an estate-tail by implication, or of the first devise (to the heirs of the body of the niece by any other husband)

being too remote, and, of course, the second. The court thought it unnecessary to determine, whether the niece took an estate by implication; and according to Lord Mansfield in giving judgment said, "the whole of the case comes to this; whether the testatrix intended by the devise *to give the heirs of the body of her niece A. L. by a second husband*, the remainder, or reversion, or estate, (whatever it is called,) after the deaths of herself *E. W.* and *A. L.*, and failure of issue between them, or whether she meant to give an estate in possession to the issue of *A. L.* by a second husband;" his Lordship, therefore, (being clear that it was not an immediate devise,) put the case *entirely* on the remoteness of the first devise.

We have seen above that an executory devise is, properly, a future devise to take effect at a period subsequent to the decease of the testator; for if the devise take effect upon a contingent event, to be decided at or before death, it is then a *conditional devise*.

A. seised of divers estates in several counties of *G.*, *R.*, and *S.*, in *Ireland*, by virtue of a settlement made by his mother, to the use of himself for life, with remainder in strict settlement, with a remainder in fee-simple, vested in himself as right heir of his mother, made his will, in manner following, reciting that he had, by his marriage settlement, settled a jointure of 400*l.* a-year upon his wife, and being desirous to make a better provision for her, he thereby devised to her all the fortune he was entitled to in her right, provided she should be content and satisfied therewith, and with 200*l.* a-year out of his real estate, during her life; "and upon default of issue male and female of his own body," he devised all his estate in the counties of *G.*, *R.*, and *S.* to trustees, in trust, in the first place, to pay all his just debts and legacies, and after payment thereof, and securing the provision made for his life, he limited his estates in the counties of *G.* and *S.* to the use of his brother *K.* for life, remainder to his first and other sons in strict settlement, with divers remainders over: and as to his estates in the county of *R.*, upon default of issue of his body, and after payment of his debts and legacies, he devised the same to his nephew *C.* for life, remainder

French v. Cadell, 6 Br. P. C. 58.

remainder to his first and other sons in strict settlement, with divers remainders over. And he thereby bequeathed *annuities* to his *sisters*, and some *small legacies* to his *nieces* and other *nephews*, and devised his real estate, *in default of issue*, to his daughters successively, and the heirs of their bodies; and if there should be any younger daughter or daughters, who should live to marry, to have such portions on the estate as the trustees and their heirs should appoint. And by a codicil, after making some alterations with regard to the life annuities, and legacies bequeathed by his will, he revoked the bequest of the money and securities that he had, or was entitled to, as his wife's portion, and bequeathed the same to the appellants and their heirs, to be laid out in lands, in trust, for his grand nephew K., with such remainders as were limited of his estates in the counties of G. and S. The case arose on an appeal from a decree in favour of the devisees, by the Lord Chancellor of *Ireland*, and the question, material to the present subject in consideration was, as to the validity of the devise of the lands in the counties of G., R., and S. It was contended on one side, that the devise of them was void, for want of a particular estate to support it as a remainder, and too remote, after a general failure of issue, to take place as a future or executory devise. On the other side it was argued, that the devise to the remainder-men, under the will of F., was, at his death, a devise *in possession*, and not an executory devise. No estate was limited to the issue by the will; but it was plain he meant a failure of issue, *living at the time of his death*. The contingency was determined the instant the will took place, *viz.* at his death. The first trust was to pay debts, legacies, and annuities to his sisters for their lives; and he could not have intended that those trusts should take place one hundred or two hundred years after his death. The legacy given by the codicil to J. C., of which the first payment was to be made on the 1st of *May* or *November*, which should first happen *after his death*, shewed what he meant by dying without issue, *viz.* if he should have no issue, *when his will should take effect*. And the codicil was expressed to be an addition to the will, and directed, that the will should stand in all points not thereby altered; and therefore the legacies were, by the will and codicil, payable only on the event of his dying without *leaving* issue at his death. And by this construction, none of those dangers could arise, which prevent the effect of executory devises; nor was any rule of law broken. And the appeal was dismissed, and the decree therein complained of confirmed.

4 Burr.
2165.

So, in the case of *Wellington v. Wellington*, which arose on a devise to the following effect, *viz.* "Item, in *DEFAULT* of *issue* of *my own body*, I give, devise, and bequeath," &c. and so gives all his estates in several counties unto trustees and their heirs, in trust, to pay out of the rents, issues, and profits unto the testator's sister an annuity during such time, and until all his just debts, funeral expences, and legacies (other than annuities) should be fully paid and satisfied, and also other annuities and several legacies. Then the testator willed that, immediately from and after such time as all his just debts, funeral expences, and the legacies

gacies given by his will (other than annuities) should be fully paid and satisfied, by his said trustees, from and out of the rents and profits of his said estates; and subject to the annuities before given, he gave and devised all his estates, as in the will is mentioned. A question was sent out of the court of Chancery, for the opinion of the court of King's Bench: whether the trustees in the will took *any*, and *what* estate under the said will? It was argued, on the part of the plaintiff that they took a *base* fee determinable upon the payment of debts, legacies, and annuities; that the default of issue of his body was only a condition precedent. The testator was a bachelor; his will was to take no effect, if he married and had children. That this devise being conditional, the court would support the intention of the testator. That the expression "in default of issue of my own body," differed from saying "on failure of issue of my own body"; the latter expression supposed that issue would exist; the former did not. That it was consistent with the event of such issue never existing, as well as of their dying in his lifetime. That was not too remote for an executory devise. It was to take no effect, if the testator should have children at his death. He had only expressed what the law would have implied. *E contra*, it was contended on behalf of the defendants, that the words, "in default of issue of my own body," meant an indefinite failure of issue, and was therefore too remote in point of law. That though the testator was a bachelor, and might think it probable that he should remain so, and therefore, in that event, might mean his devisee over to take, yet, the same intention for them to take was as probable, in case a different event had happened, namely, that of his marrying and having issue, and that issue afterwards failing; both dispositions were equally reasonable and proper and might (for aught that he knew to the contrary) be equally legal. That the testator did not mean to give his trustees a base fee. He only meant to give them an estate "*on failure of his own issue*", whenever they should become extinct. Then, and not till then, his devisees over were to take. But that was a period too remote for supporting it as an executory devise. That there was no foundation to support this devise, as an immediate devise. *Sed per Lord Mansfield*, when a devise must take effect at the death of the testator, it is not properly an executory devise. Such a devise is a devise upon a contingent event, which must happen at or before the death of the testator; an executory devise is a devise that is to take place *in futuro*. And the court certified that they were of opinion that the trustees took a *fee*, determinable when the purpose of paying the testator's debts, legacies, and funeral expences, out of the rents, issues, and profits of the devised premises, in aid of the personal estate, should be performed.]

A man devised lands to his executors till his son should come of age, and when his son should come of age, then he should enjoy them for him and his heirs: this is a remainder executed in the son, and not in contingency, for the words *when* and *then* in this case only denote the time when the remainder is to execute, and will no more make the remainder contingent than in the common

case,

3 Co. 19.
Baratton's
case, *vide*
head of Re-
mainder and
Reversion.

case, when a lease is made for life or years; and after the decease of the tenant for life, or the expiration of the term for years, then to remain to another; for though the words be *after the term it shall remain*, yet it is a present and not a contingent remainder, for where words refer to that which *must needs happen*, there shall be no contingency.

Dyer, 303.
Hob. 33.

A. having issue five sons, (his wife being *enseint* with a sixth,) devised two-thirds of his lands to his four younger sons, and the child *in ventre sa mere*, if it were a son, and their heirs; and if they all die without issue male of their bodies, or any of them, that the lands shall revert to the right heirs of the devisor: by this devise, the younger sons are tenants in tail in possession, with cross remainders over to each, and no part shall revert to the heirs of the devisor, till all the younger sons be dead without issue male of their bodies.

Cro. Jac.
695.

A man having two sons, devised part of the lands to one of them and his heirs, and the rest to the other and his heirs, and further willed that the survivor shall be heir to the other, if either die without issue; by this the devisees are tenants in tail, with remainder in fee executed of each other's part.

Cro. Jac.
448. 655.
Gilbert and
Whitty,
S. C. cited
in Saund.
104.
(a) No cross
remainders
can be cre-
ated by im-
plication in
a deed, nor
by will be-

But where a man having three sons, and seised of three houses, devised a house to each son and his heirs, with this proviso, that if all his said children shall die without issue of their bodies lawfully begotten, that then all his said messuages shall remain over, and be to his wife and her heirs: it was held in this case, that these words did not raise any cross remainders, but that at the death of any of the sons, his house should go immediately to the wife; and though a cross remainder may be by implication where lands are limited to two, yet they cannot rise where three or more houses are limited to three, (a) without express limitation.

tween three or more, unless the words of the will do plainly express the intent of the devisor to be so; as where Black Acre is devised to *A.*, White Acre to *B.*, Green Acre to *C.*, and if they die without issues of their bodies, *vel alterius eorum*, then to remain; there, by reason of the words *alterius eorum*, cross remainders shall be. Vent. 224. per Hale, C. J. Vide *supra* [F].

(K) Of Executory Devises of Leases for Years: And herein of the Limitation of the Trust of a Term as far as it relates to, and agrees with a Devise thereof.

Cro. Car.
198. Roll.
Abr. 610.
8 Co. 94.
(a) The
great ques-

IF a farmer devises his term to *A.* for life, the remainder to another, though *A.* has the whole estate, (for that is in him during his life,) and so no remainder can be limited over at common law, yet it is good by way of (a) executory devise.

tion in these cases was, Whether the disposition of the term to a man for his life was not such a total disposition of it, that no remainder could be limited over, it being in the eye of the law a greater estate than for any number of years? and this was resolved in the affirmative in the reign of E. 6. Dyer, 74. by all the judges of England; but this resolution seeming very severe, and against natural justice, that a man should be hindered from making provision for his family, and the contingencies of it, occasioned a contrary resolution. 19 Eliz. Co. Lit. 46. Dyer, 35. For the judges observing the good effect such limitations by way of trust had, which were allowed in Chancery, permitted farmers to dispose of their leases in the same manner by last will; and then the Chancery, the better to fix them in it, allowed of bills by the remainder-man, to compel the devisee of the particular estate to put in security, that he in remainder should enjoy it according to the limitation; but when they perceived that this multiplied Chancery

Chancery suits, they resolved that there was no need of that way, 10 Co. 47. a. 52. b. Sid. 451. but that the particular devisee should not have power to bar the remainder-man; so that the law has been long settled, that executory devises of terms for years are good, provided the contingency is to happen within a life, or 20 lives all *in esse*; for then there can be no tendency to a perpetuity, which was the great mischief apprehended from these kinds of limitations. Abr. Eq. 191.

So, if *A.* possessed of a term for years, devise it to *B.* his wife, for 18 years, and after to *C.* his eldest son for life, and after to the eldest issue male of *C.* for life, though *C.* had not any issue male at the (*a*) time of the devise, and death of the devisor; yet, if he have issue male before his death, this issue male shall have it as an executory devise; for although it be a contingency upon a contingency, and the issue not *in esse* at the time of the devise; yet, inasmuch as it is limited to him but for life, it is good, and all one with (*b*) *Manning's* case.

a term, devises it to *B.* his wife for life, and after her death to his children unprefixed, and after *B.* dies, *C.* then being the only daughter of *A.* shall have it; for an executory devise, that hath a dependence on the first devise, may be made to a person uncertain. And. 60, 61. (*b*) Where a term of 50 years was devised to *B.* after the death of *C.*, and that *C.* should have it during his life, it was adjudged that this was a good devise of as much of the term as remained at the death of *C.* 8 Co. 95. Matthew Manning's case.

But if *A.* devise his term to his wife for her life, and after her decease to *B.* his son; and if *B.* die without issue, then to *C.*, this devise to *C.* after the death of *B.* without issue is void; for since it cannot vest while *B.* had issue of his body, the devise is no more than to *B.* and the heirs of his body, which, without doubt, would be void; for though men presumed on the judges when they first allowed of remainders of terms after estates for lives, and endeavoured to bring remainders upon estates-tail within the reason of these resolutions and concessions; yet, the courts would never endure those remainders, because it is too foreign and distant to expect them after the man's death without issue; and if they were allowed of, would make a direct perpetuity, which is an undeniable reason against any settlement, for it is against the nature of human affairs so to settle an estate in a family, that upon no contingency or revolution of fortune the owner shall have power over it.

Therefore, the devise to *B.* in the above case is an absolute disposition of the term to him, and vests it totally in him, and at his disposal, and shall go to his executors during the continuance of it, and shall never for default of issue of his body revert to the executors of the devisor.

and Sid. 37. which seem *contra*, but have been denied to be law. 3 Chan. Ca. 6. 10.

If one possessed of a term devise it to his wife for life, the remainder to his first son for life, and if he die without issue, to his second son, &c. the remainder to the second son is void, for the remainder of a term cannot depend upon a possibility so remote, as the dying without issue; although it was objected that the devise was not to the first son and his issue, (in which case it was agreed it should go to his executor,) but it was given to him for life only, with an executory devise to the second son, upon the contingency of the first's not having issue at the time of his death.

Roll. Abr. 612. Cotton and Heath, adjudged by Jones, Croke, and Berkley, on a reference out of Chancery.

(a) If *A.* possessed of and after *B.* dies, *C.* then being the only daughter of *A.* shall have it; for an executory devise, that hath a dependence on the first devise, may be made to a person uncertain. And. 60, 61. (*b*) Where a term of 50 years was devised to *B.* after the death of *C.*, and that *C.* should have it during his life, it was adjudged that this was a good devise of as much of the term as remained at the death of *C.* 8 Co. 95. Matthew Manning's case.

Cro. Car. 67. Roll. Abr. 610. Sid. 456. Cro. Jac. 46. 6 Inst. 87. 3 Chan. Ca. 6. 10.

Sid. 451. Roll. Abr. 611. 831. But *vide* 10 Co. 87. Leonard Lovie's case;

Lev. 290. Love and Wyndham. 2 Chan. Rep. 14. S. C. Sid. 450. Vent. 79. Mod. 50. 2 Keb. 637.

2 Freem.
210.
Burford
v. Lee.
2 Freem.
287. Anon.

[So, where a lessee for 1000 years without impeachment of waste, devised to *L.*, and if he should die without issue, then to *B.*; the court held, that the remainder was void, and that the whole vested in *L.*, his executors and administrators. And where a personal estate was devised to *A.*, and in case she should die without issue, then to *B.*, it was resolved that the devise over to *B.* was void, and the whole decreed to *A.*

Fitzgib. 68.
Green v.
Rod.

Again, where *A.* possessed of a personal estate, appointed by will that it should be sold, and the money arising from the sale be to the use of his sister *M.*, and if she should die without issue, it should go equally between his other sisters; and in a subsequent clause it was said, *then after the death of his sister M. in manner aforesaid, &c.*; there, it was contended, that although the first limitation to *M.* contained nothing to restrain the generality of the meaning, *of dying without issue*; yet the words in the subsequent clause *then after the death* amounted to a restriction, which confined it to a dying without issue *living at the death of M.* But the court observed that the words in *manner aforesaid*, prevented such a construction; because they referred to the first limitation, and were tantamount to a repetition of it; which being a dying without issue generally, the limitation over was too remote, and therefore void.

And so in a case of later date, where the testator said, *M. D. I make my sole heir and executrix, and if she die without issue*, then to go to *L. B.*; Lord *Hardwicke* held, that no authority came up to supporting the point, that *ex vi termini* such a limitation of a personal estate should be confined to a dying without issue *living* at the death of the first taker; and that as the limitation was general, and not restrained by any circumstance in the will, the devise over was void. And his lordship was of the same opinion in a subsequent case, when he said, "Where there is a devise of a lease for years to a man, and if he die without issue, remainder over; there is no doubt but the whole interest vests in the first taker."]

2 Atk. 308.
Beauleuk
v. Dormer.

2 Atk. 376.
Saltern v.
Saltern.

Cro. Jac.
459. Child
and Bailly.
Palm. 333.
336. C. S.
Jon. 15.
S. C. Roll.
Abr. 612,
613. S. C.

If a man possessed of a term for years devises it to *D.* his wife for life, and after to *W.* his eldest son, and his assigns, and if he dies without issue *then living*, to *T.*, this being a perpetual limitation by intendment of law is void; and if men should be admitted to make such devises, there would not be any end of them, nor any certainty.

Mod. 52. cited, and Sid. 37. cited. And in 3 Chan. Ca. 1. &c. in the Duke of Norfolk's case, where it is denied to be law; and in Salk. 225. pl. 3. Carth. 226. denied to be law; and that the established law in cases of this nature is the Duke of Norfolk's case. See the next case.

3 Chan. Ca.
2., &c. de-
creed by my
Lord Not-
tingham,
but reversed
by North,
Lord Keep-
er. Vern.
163. But
upon an ap-

A. having issue several sons (the eldest *non compos*) created a term for years, and by another deed declared the trust thereof to his second son, and the heirs male of his body, remainder to his other sons; provided that if his eldest son died without issue, or not, leaving his wife *ensient* with a child, living the second son, so that the earldom of — descended on the second son, then the said term to remain to the third son and the heirs male of his body, with like limitations to the other sons; the eldest son died without

Without issue, living the second, and this limitation to the third son was held good.

North's decree was reversed, and Lord Nottingham's established. Chan Ca. 53. And has been ever since admitted to be law; and note, that executory devises and limitations of the trust of a term are governed alike. Vern. 234. Pollexten, 15 to 50.

If a man possessed of a term devise it to his son; and if he die unmarried and without issue, to his daughters; and if his son be married, and have no issue then living to enjoy it, then after the death of his son's wife he devise it to his said daughters; the devise to the daughters is void, being a limitation after the death of their brother without issue; for it is not to be taken (as objected) that the dying should be without issue living at his death, and so the contingency to happen within the compass of a life; and if it should be intended of such dying without issue, yet the court held it would be void, according to *Child* and *Bayly's* case; for though such a devise hath prevailed in case of an inheritance, as in *Pell* and *Brown's* case, yet it hath not yet prevailed in case of a term; and the court said they would not extend the devises of chattels to make perpetuities farther than they had been.

peal to the House of Lords, Lord

3 Lev. 22, 23. Gibbons and Summons. But 2. of this case, for it does not seem to be law; and *vide* the case of Sanders and Cornish, Roll. Abr. 612. Cro. Car. 230. and Cro. Jac. 461. a case cited where A.

possessed of a term for years devised it to his wife for life, and then that *J.* his son should have the occupation thereof as long as he had issue; and if he died without issue unmarried, in the same manner to another son, the remainder over; this remainder upon the death of the son unmarried was adjudged good; for here the limitation is, if he dies without issue unmarried, then the remainder over, which is upon the matter, if he dies within the term unmarried, for he cannot have issue, unless he marries; and this is a possibility which the law will expect, because it will happen in a life; and there is no difference between the occupation or use of a term, or the profits of the land, and the land itself, or the lease or farm; for a devise of any of them will carry the whole interest. And *vide* the following cases.

If a term be devised to *A.* and the heirs of his body; and if *A.* die without issue, living *B.*, then to *B.* this is a good limitation, the contingency arising within the compass of a life.

Salk. 225. pl. 3. Comb. 208. Lamb and Archer.

A. devises to his son, his executors, administrators, and assigns for ever, a leasehold estate; but if he died before 21 without issue, in that case he devises it over to his brother; and the question was, whether the remainder over was good? It was objected, that it was a perpetuity, for that the remainder depends on the son's dying without issue; for if he die before 21, though he leaves a child, and that child afterwards die without issue, the son may be said to be dead before 21 without issue; yet the court held the remainder good.

Carth. 266. S. C.

One *F.* being possessed of a term for years devises it to his wife for life, and after her death to *R. F.* for her life, and after her death to *T. F.* and his children, and then devises in this manner: and if it shall happen the said *T. F.* to die before the expiration of the said term, not having issue of his body then living, then to go over to the plaintiff for the residue of the term; the defendant's title was by an assignment of *R. F.* and *T. F.* of all their estate, right, title, and interest; *R. F.* was dead, and *T. F.* died without issue; and the plaintiff brought his bill to have an assignment of the term, pursuant to the will. All that was insisted upon for the defendant to difference this case from the Duke of *Norfolk's* of a term, and of *Pell* and *Brown's* case of a fee, was, that this con-

2 Vern. 151. Martin and Long.

Abr. Eq. 193. Fletcher's case.

tingency of his dying without issue was not confined to his own death; but that the words *then living* should relate to the words *before the expiration of the term*, and so this went farther than any of the cases had ever yet been carried; for he might have issue for several generations, and yet if such issue failed at any time before the expiration of the term, then it was to go over, and this in a long term tended plainly to a perpetuity, and therefore ought not to be allowed; but by the devise to *T. F.* and his children, and the subsequent words, and if he die without issue, the whole term and interest was vested in him, and he might dispose thereof as he thought fit, and it could not be restrained by the words *then living*, which related only to the words *before the expiration of the term*, and so the remainder over to the plaintiff void. But for the plaintiff it was argued and agreed, that the remainder to him was good by way of executory devise, and that the words *then living* must relate to the time of his death; for otherwise there would be no difference between this and the common limitations of a term to one, and the heirs or issue of his body, and if he dies without issue, the remainder to another, which is void; for there, it must likewise be intended, if he die without issue before the expiration of the term, or during the term; since after the expiration of the term he can limit no remainders over, because nothing remains then to be limited; but, here, it being limited over upon this contingency, if he die without issue then living, *viz.* at the time of his death, it is good, because this contingency must happen within one life, or not at all; for upon his death it will be certainly known whether he leaves issue or not; if he does, the contingency cannot take place; if he does not, then it may; and this being to happen within the compass of a life, is good as an executory devise, and differs in nothing from the Duke of Norfolk's case, save only that there it was by *proviso*, and also upon the death of another person without issue then living; and here it is upon his own death, which makes no manner of difference.

Abr. Eq.
193, 194.
Targett and
Gant. *Vide*
2 Vern. 43.
195.
The case of
Peacock and
Spooner, and
2 Vern. 668.
Webb and
Webb, Abr.
Eq. 362.
Fitzgib. 317,
320. 1 P.
Wms. 432.
pl. 121.
10 Mod.
403.

A man possessed of a term for 31 years devises it to his son *H.* during his minority, and if he attains to his age of 21 years, then to him during his life, if the term shall so long continue, and no longer, and after his death, to such of his issue to whom he shall devise it; but if he die without issue, then to his other son *G.* for the residue of the term; *H.* afterwards died without issue, or without making any disposition of the residue of the term; and the only question was, whether by the words of this will the whole term did not vest in *H.*? and it was decreed, that it did not; for the words *die without issue* have a twofold meaning, either without issue at the time of his death, or without issue, whenever the issue fails; and though in case of an inheritance, if lands are devised to one, and if he die without issue, the first devisee takes an estate tail by implication, which shall go to his issue, and they shall take in a course of descent to all succeeding generations; yet, to make such a construction in the case of a term, which cannot come to the issue by descent, is unnecessary; and therefore, in such case, the other construction of the words, which is most natural and obvious,

obvious, shall take place; and it shall be intended only, if he die without issue living at the time of his death; and, consequently, the dying without issue, being confined within the compass of a life, hinders not the remainder over, but it may well take place by way of executory devise, according to former resolutions.

[One devised money to be laid out in a purchase of freehold estates to be settled on his wife for life; and also gave his wife freehold and leasehold estates for her use; and from and immediately after her decease, he bequeathed the same, and every part thereof in the following manner, *viz.* to his son *R.* and *his issue lawfully begotten*, or to be begotten, *to be divided amongst them as he thinks fit*: and if my said son shall happen to die, without issue lawfully begotten, my will is, that as well my present freehold and leasehold estates, as the estates hereby directed to be purchased, shall be sold, and the money arising therefrom shall be equally divided between my brother *T. R.*'s children, my sister *W.*'s children, and my sister *P.*'s children. And I hereby order and direct, neither the estate directed to be purchased, nor any of my present freehold or leasehold estates may be sold or disposed of during the life of my wife or my son. One question was, Whether the devise to the brother and sister's children was or was not too remote, as depending upon the son's dying without issue? And it was held to be a contingency with a double aspect; in one event a gift to the children of the son, if he should have any, and if he should not have any child, that then the estate should be sold for the purposes of the will. That he did not mean the estate to go as an estate-tail, but that the children should take distributively, in which case they must take as purchasers, and the consequence was that *R.* took only an estate for life. He had a power to divide, and it was sufficient that the division must take place at the death of *R.*, which was within the rules. Two events were provided for, *1st*, There being children of *Richard*, in which case they would take. *2dly*, There being no children, in which case the estates vested in the persons described.

A testator devised a term to his brother *John* for life, then to such person as he should marry, for her jointure; and after her death to the heirs of the body of his brother *John*, and the executors, administrators, and assigns of such heirs, during the residue of the term; and for default of such issue of his brother *John*, then to *Henry Donne*, the limitation to *Henry* was held good; the words being taken to be heirs living at his death.

Where *C.*, having two nephews *A.* and *B.* devised the surplus of his personal estate to them, and if either of them should die without children, then to the survivor: It was held, that dying without children must in this case be taken to be dying without children then living; because the immediate limitation over was to the surviving devisee.—So, where *A.* devised portions to his four children, payable at their respective ages of 21 or marriage, and in case any of them should die before the time of payment, and without issue, then his or their portion to go to the survivors or

Hockley v.
Mawbey,
3 Br. Ch.
Rep. 82.

Donne v.
Merrifield,
at the Rolls,
22d October
1730, cited
in Ca. temp.
Talb.

1 P. Wms.
534.
Hughes v.
Sayer.

Chan. Prec.
528.
Nicholls v.
Skinner.

survivor, and his heirs: it was held, this could not be a dying without issue generally, but so as the *survivor* might take; which must be during the life of some or one of them, and so was good.

And where the testator made his wife executrix, and gave her all his goods and chattels, provided that if she should die *without issue* by the testator, *then after* her decease *80l.* should remain to the testator's brother; the words *then after* were taken to mean *immediately after*, and, consequently, to restrain the dying without issue to the time of her death.

Pinbury v.
Elkin, 1 P.
Wms. 563.
Vide Paine
v. Stratton.
3 Br. P. C.
257.
er Brooks
v. Taylor, Mosel. 183.

So, where a term was devised to *A.* for life, remainder to such children as the testator should leave at the time of his death, and if all such children should die without *leaving* any issue, then to *B.* this was a good executory devise to *B.*, and the words "Without *leaving* any issue" were understood to mean "*leaving any issue at the time of their deaths.*" Again, where one devised a personal estate, in trust, to be settled on his daughter *or the heirs* of her body, but in case his said daughter should die *leaving* no heirs of her body, then over to others; Lord *Hardwicke* decreed the limitation over good, upon the contingency of the daughter's dying without issue *living* at her death; as he considered the word *living* as relating to that time. So in another case, where the testatrix gave to her two nieces *F.* and *L.* each one half of the produce of bank stock, and to *their issue*, and if either of them should happen to die before the legacy became due to her, and leave no issue, the share of her so dying should go to the survivor; the words *and leave no issue* were construed "*leave no issue living at the time of her death.*"

So, where one possessed of premises for a term for years "gave them to his grandson *P.* son of *D.* and his wife, and the heirs lawfully of him for ever, but in case he should happen to die and *leave* no lawful heir, then and in that case, he gave them after the death of his said grandson *O.* to the next eldest son or heir of *D.* and his wife; and so on to the next eldest son or heir, if the last should die without heirs;" *P.* took possession and died without issue, and on his death the next eldest son of *D.*, and his wife brought an ejectment, and Lord *Kenyon*, without hearing the argument said, that on conference with the rest of the court, they were clearly of opinion, that the limitation over was good. This was a chattel interest limited to *P.* and the heirs lawful of him for ever, but in case he should happen to die and leave no lawful heir, then over, &c. now it was apparent on the will, that the testator "by lawful heirs" meant "heirs of the body," and "leaving no lawful heir" must be confined to "leaving no issue at the time of his death."

But the trust of a term for raising portions on either of two contingencies, of which one is within the allowed limits, will be good *in that event.*

Thus, a term of 1000 years was created in a marriage settlement, upon trust, "that *in case the settlor should happen to die, without*

Goodtitle
Pagden,
2 Term
Rep. 720.

Longhead v.
Phelps,
2 Bl. Rep.
704.

without issue male of his body, on the body of his intended wife begotten, or if all the issue male between them should happen to die without issue, and there should be issue female of the marriage, which should arrive respectively at the age or ages of eighteen years, or be married; then, from and after the death of the survivor of the settlor and his wife without issue male, or in case at the death of the survivor, there should be issue male, then from and after the death of such issue male, without issue, the trustees should raise 500*l.* for one daughter, 1000*l.* for two, and in case of three or more, should assign the whole term to their use. There was issue of the marriage one son and four daughters, who all lived to eighteen, and were married. The father died, then the son died without issue. Afterwards the mother died, and then the four daughters entered, against whom an ejectment was brought by a devisee of the son. And in support of the ejectment it was argued, that the trusts of the term were void: being on too remote a contingency, *viz.* the dying of the issue of the marriage without issue generally. But the court were clear, that the first part of the contingency was good, *viz.* "in case the settlor and his wife died without leaving issue male;" and as that happened in fact to be the case, the court would not enter into the consideration, how far the other branch of the contingency might have been supported, which could only come in question, in case the son had survived both his parents.

W. C. left and bequeathed, unto his daughter and only child, all his worldly substance, lands, stock, corn, debts, and household goods, provided she married by the consent of his executors therein mentioned: but in case she married without the consent of his executors, she was to have only twenty cows and a horse for her whole fortune: and after naming *A.* and *B.* his executors, he appointed, that in case his said daughter should die *without issue*, all his said substance should return back to his executors, to be distributed as he should thereafter direct.—And lastly, in case his daughter should marry without consent, or die *without issue*, he appointed that all his said substance, &c. should return back to his executors to be by them distributed in manner following, *viz.* to his nephew *J. D.* 100*l.* to *H. G.* 50*l.* to each of his executors *aforsaid* 50*l.* to his daughter twenty cows and a horse only, and the remainder to be equally divided amongst the children of his sister *E. F.*

Keily v.
Fowler,
6 Br. P. C.
309.

The question was, Whether the limitation over of the personal estate after the death of the testator's daughter *without issue* was good? The court of Chancery in *Ireland* held it was: and their decree was confirmed by the House of Lords here, upon the opinion of the judges, that the bequest over was to take effect on the death of the daughter without *issue then living*.

H. directed that his personal estate should be sold, and turned into money, and put out at interest; that his wife *Ann* should have 30*l.* a year out of the produce of it, and that, when and so soon as his only daughter and child *Ann* should attain her age of 21 years, then his wife should have 25*l. per annum* instead of 30*l.*

Balguy v.
Hamilton,
Mofel. 186.

Then the will goes on, *Item*, I give and bequeath to my daughter *Ann*, all my personal estate whatsoever, she paying the said 30*l.* a year, and the legacies therein bequeathed, and I make my wife her guardian, and she is to receive the residue of the interest, maintaining my daughter thereout; but if my said daughter die before her age of 21 years, then my will is that my wife shall have 400*l.* and that on payment of the same, she shall give a discharge for her said annuity, and that then and immediately from and after my said daughter's decease "*without issue of her body.*" I give and devise all my personal estate to my brother *J. H.*, *he paying* the said sum of 400*l.* to my wife, if then living. The testator died, and *Ann*, the daughter, died an infant without issue, and then the wife died. And the only question was, Whether the devise over to the brother was good, or whether the whole personal estate vested in the daughter? *Et per cur.* A devise of personalty, after a dying without issue, is *certainly* void; and it is as certainly good after a dying without issue in a limited time; now the words of this will can bear no other construction, but if the daughter die without issue before 21. First, the whole estate is devised to the daughter, and the whole interest to the wife, part as an annuity for herself, and part for the daughter's maintenance. The first contingency is general, if she (the daughter) die before 21 years of age the wife is to have 400*l.*, but who is to pay this 400*l.*? The brother; so that the latter words must have the same construction, and the will is to this purpose, if my daughter die without issue before 21, my brother is to have the whole estate he paying my wife 400*l.* the wife is to have the 400*l.* if the daughter die under 21, and the brother being to pay it, if she die without issue, the estate must come to him at the same time, as a fund out of which it is to be paid.

Lyde v.
Lyde,
1 Term
Rep. 593.

One possessed of premises for a term of years, gave them by will to his son *G. L.* for life, and after his decease to *M.* his wife for life, and after the decease of the survivor, to the *children* of *G. L.* *share and share alike*; but if *G. L.* should die "*without issue of his body,*" then to his son *R. L.* for life, and after his decease to *N.* his wife, with divers limitations over; *M.* died, and then *R. L.*, and the question was, whether the limitation to *N.* was good? And the court held, that it was; for here was no such express legal limitation as, if applied to a freehold, would create an estate-tail; and therefore they were at liberty to consider the intention of the testator, and that was obvious.

Attorney-
General v.
Bayley,
2 Br. Ch.
Rep. 553.

One seized in fee of certain estates, and also of part of a tenement called *A.*, and possessed of other parts of the same tenement called *A.* for a long term of years, made his will and after devising so much of the estate as was freehold to trustees, their heirs and assigns, and so much whereof he was possessed for a term of years to his executors, &c. declared that as *concerning those parts called M. and B.* whereof he was possessed of a long term of years, his will was, that his brother *W. T.* should have the use thereof, &c. for so many years of the term as should expire in his lifetime, and after his decease, his will was, that his executors should permit

permit all and every the child and children of the said *W. T.* their executors, &c. respectively, to hold and enjoy the same for his and their proper use, during the remainder of the said term, *in such manner as the said W. T. should, by his will or deed in writing, &c. direct, and for want of such appointment, then equally, share and share alike, without benefit of survivorship; but if it should happen that the said W. T. should die without issue, in the lifetime of the said J. T. and T. T. or either of them, then his will was, that the said J. T. and T. T. if they both survived the said W. T. dying without issue as aforesaid, should equally have the benefit and advantage thereof for so many years of the term as should expire in the lifetime of the said J. T. and T. T., and if only one of them should happen to survive the said W. T. dying without issue as aforesaid, or if both should happen to survive the said W. T. so dying without issue as aforesaid, and one of them should happen to die before the other of them, leaving issue behind him, then the testator's will was, that such survivor should have but one half of the benefit and profits of the said leasehold premises, and the other half should go to be divided among all and every the child and children of him so dying, share and share alike, during so many years of the term as should expire in the lifetime of the said J. T. and T. T., and if he so dying should leave no issue behind him, the testator's will was, that the benefit thereof should devolve upon the survivor, for so many years of the term as should expire in the lifetime of the survivor, and after the decease of the survivor of them the said J. T. and T. T. (in case they or the survivor of them should survive the said W. T. dying without issue as aforesaid), the testator's will was, that all and every the child and children of the said J. T. and T. T. (though one of them might or should happen to die before the said W. T. dying without issue as aforesaid) and the executors, administrators, and assigns of such child and children should have the said leasehold premises, share and share alike, for and during the remainder of the term, and "in default of such issue," "or if the said W. T. should happen to survive, and die without issue," after the death of the said J. T. and T. T., then the testator's will was, that the said leasehold premises should go to and be applied towards the benefit of T. new church and charity school as aforesaid. The testator died. *W. T.* died unmarried and without issue. *J. T.* and *T. T.* both died in the lifetime of *W. T.*, *T. T.* without issue, and *J. T.* leaving issue one daughter *M.* The question was, Whether *W. T.* having survived *J. T.* and *T. T.*, and died without issue, as in the last limitation mentioned, the premises, on his death, became subject to the charitable bequest, for the benefit of T. church and school? The cause was first heard at the Rolls, when his Honour was of opinion, upon the construction of the will, that the interest of the testator was not well disposed of thereby in favour of the charity. From this decree the charity appealed.*

Per Lord Thurlow Chancellor, If a man gives an estate in general to *A.* for life, and adds, "but if he dies without issue, I then give it to *B.* *B.* has no immediate gift, but only a contingent interest

interest upon *A.*'s dying without issue; and it would counteract the intention of the testator, if *B.* took it immediately upon the death of *A.*, therefore *ex necessitate rei*, the true argument, in both *real and chattel interests*, is, that in fact these words operate to an enlargement of the estate *for life*, for otherwise the issue of *A.* would not take at all, and *B.* would take the whole; and therefore the necessary implication must take effect, namely, that *A.* should have an estate, which must devolve upon his issue. Upon that ground, the court has extended the estate beyond an estate for life, and in a freehold interest has deemed it an estate-tail, and in chattel interests an absolute property; but *that* arises from the *necessity of the construction*.

In this case after an express estate for life to *W. T.* (so that he may take as a purchaser) the testator proceeds, &c. (stating the limitations in the will); here, no such necessity arises from the words "dying without issue," as the words are referable to dying without issue, *so provided for*. It is so well settled that no dispute could arise. If the *T*'s had no interest, that they could take, it would go to the charity. In the events which have happened, this case results to the ordinary one I have stated, and the charity must have a decree. And the decree at the Rolls was reversed.

Bigge v.
Bensley,
3 Br. Ch.
Rep. 190.

One bequeathed all his personal estate to his wife *F.* to hold to her, *her heirs, executors, administrators, and assigns* for ever, and appointed her sole executrix, *but in case of the death of F. without issue*, then he gave the whole to the eldest son of his brother *R.* his heirs, executors, administrators, and assigns, and if there should be *no such son*, then to his said brother *R.* The wife survived the testator, and died without issue. And the question was, Whether the devise over was valid? It was contended in support of the devise over, that the "dying without issue" was not general, but controlled by the event of having no son, in which case the devise was in favour of *R.* himself; that therefore if the testator meant a dying without issue, indefinitely, it could not affect the son of a person then living, much less that person himself. Therefore the event must be decided on the death of *F.*, when if he, *R.* had a son, it would vest absolutely in that son, if not, it would vest in *R.* *Et per Lord Thurlowe*, The first question is, what, *abstracted from little points and circumstances*, would be the effect of the gift to *F.*? There was not a single case, not even that of *Atkinson and Hutchinson*, which did not hold *that such a limitation after these general words was too remote*. His lordship should only notice *Dormer v. Beaucherk*. The general words were to be varied only by *circumstances arising upon fair demonstration*. To call dying without leaving issue, the natural sense of dying without issue, was against all the cases. In this case there was no circumstance which had occurred in the others. In *Dormer and Beaucherk*, it was held, that the word *then* could not, and never did make the difference. It was merely a word of relation, not an adverb of time. Upon Lord Hardwicke's authority, he must hold the word *then* did not make a difference. As to the gift to the brother,
Dormer

Dormer and Beaucherk was a stronger case as to that point, It was argued there, upon the circumstance of the 5000*l.* being meant as a portion; that being a maintenance, and given after a dying without issue, it must mean dying without leaving issue.]

(L) Of void Devises: And herein,

1. Of devising what the Law already gives, or what the Policy of the Law will not admit.

Although the judges are favourable in their construction of wills, that, if possible, the intention of the testator may prevail; yet, where the testator makes the same disposition of his estate as the law would have done, had he been silent, or where his disposition is made in such general terms, that his intention is altogether doubtful and uncertain, and cannot be collected from the words of the will; or, where the testator is establishing a settlement against the reason, and policy of the law; in these cases the judges have thought fit to reject the will.

Therefore if a devise be made to *J. S.* and his heirs, who is heir at law to the devisor; this is a void devise, and the heir shall take by descent as his better title; for the descent strengthens his title by taking away the entry of such as may possibly have right to the estate, whereas if he claims only by devise, he is in by purchase.

Roll. Abr.
626.
Hob. 30.
Plow. 545.
Godb. 467.

So, if a man devises lands to his wife for life, remainder to *J. S.*, who is heir at law in fee; this is a void devise to *J. S.*, because after the disposition of the particular estate, the reversion would have come to him by descent, as heir at law.

2 Leon. 301.
Baspole's
case. Hob.
30. Roll.
Abr. 626.

Preston and Holmes.

[*I. P.* seised of lands in fee, and having issue *R.*, *S.*, *I.*, and *M.*, sons, and *N.* a daughter, devised to *S.*, *I.*, *M.*, and *N.*, 20*l.* to be paid to them when they attained the age of 21 years; and devised all his lands to *R.* his eldest son, to hold to him and his heirs, upon condition he should pay to his (the testator's) other children the said sums appointed unto them according to the intent of his will; and if he refused payment of any of the said sum or sums of money, that then neither he nor his heirs should have or enjoy the said lands, any devise, title, descent, or interest to the contrary notwithstanding; but that the said sons and daughter should have it to them and their heirs. It was holden, that the first devise to the son and his heirs in fee, being no more than what the law gave, was void.

Haynsworth
v. Pretty,
Cro. El.
833. 916.
Moor, 644.
S. C.

One, seised in fee, devised lands to his wife for life, and after her decease to his next heir at law, and to his or her heirs, provided such heir should pay 100*l.* to such person or persons as his wife, by will or other legal writing should appoint, and that his lands should stand charged with the said 100*l.* The devisor died, leaving a daughter who had one son, and died. The wife died without making any appointment to whom the 100*l.* should be paid. The son of the daughter entered, and died without issue;

Clarke v.
Smith, Com.
Rep 72.
1 Salk. 241.
S. C.

and

and on a dispute between the heir maternal of the son, and the heir paternal, the question was, whether the son took by purchase under the will, or by descent? And it was resolved by the whole court, that the heir took by descent, and not by the will; for it would be mischievous, if every little legacy should alter the course of descent, and thereupon the heir might plead to the obligation of his ancestor, *riens per descent*.

Allam v.
Heber,
2 Str. 1270.
1 Bl. Rep.
22. S. C.

So, where a testator devises lands to his heir for payment of debts, or charged with an annuity, the heir, notwithstanding such charge, is in by descent, for the tenure is not altered.]

Emerson v. Inchbird, 1 Ld. Raym. 728.

3 Lev. 127.
Hedger and
Row.

A. seized of lands on the part of his mother, devises them to his executors for sixteen years, for payment of his debts, and after devises them to his heir at law *ex parte maternâ*; this is a void devise to the heir at law; for though it was urged, to support the devise, that if it obtained, the heir of the part of the father might in the end inherit, which he could never do if the devise be rejected; yet they adjudged the devise to be void, because there is no alteration made in the tenure of the estate; nor is the quality thereof any wise altered; but whether the devisee takes either by descent, or the will, it is a fee-simple, and it were but *actum egere* to make him take by will.

Hob. 29, 30.
Cownden
and Clerk.
Moor, 860.
Godolp. 461.
Roll. Abr.
610.

But where another estate is created by the will than would descend to the heir at law, or where the quality of the estate is altered by the devise, there, the disposition by the will shall prevail, though it be made to the heir at law. Thus, where a man had issue a son and a daughter, and devised that his land should descend to his son, and if he died without issue of his body, then the land to go over, &c.; the son by this will took an estate-tail, though heir at law to the devisor, because here is an estate-tail created by the will; whereas a fee-simple would have descended, which if the devisee were allowed to take, it would make the remainder over void.

3 Lev. 127.
Cro. Eliz.
431. 2 Sid.
53. 780.
Packman
and Cole.

So, where a man has issue only two daughters, and devises his lands to them and their heirs; this is a devise to the heir at law, (for so are the daughters,) and yet good, because the devise makes them jointenants, in which survivorship takes place; whereas had they taken by descent, they had been coparceners, and therefore the will altering the quality of the estate ought to prevail.

Hob. 33.
Perk. 506.

A. devises his land to *B.* for life, the remainder to *C.* in tail, the remainder to the next heir male of the devisor, and the heirs male of his body; *B.* and *C.* died without issue; the next heir of the devisor was a daughter, and she was adjudged to have the land by way of reversion and descent; and though she have a son born afterwards, he shall not take the land from her.

Co. Lit. 12.
Dyer, 33.
3 Chan. Ca.
35. vide
supra letter
(1).

Also, devises are rejected that are against the reason and policy of the law: hence, devises, as well as all other settlements, which tend to introduce a perpetuity, are void; for wills, though favourably expounded, are yet to be construed according to the common rules of the courts of law and equity; therefore a devise to *J. S.*
and

and his heirs, the remainder to *J. D.* and his heirs, is void, because the law in no case will allow a limitation of a fee upon a fee, because by the devise to *J. S.*, and his heirs, the deviser has transferred the whole estate to him, and then the limitation over must be void: nor can this devise be good by way of future interest, or a remainder to vest upon a contingency, because no man can say when the heirs of *J. S.* will fail; and to allow the remainder to *J. D.*, to be good upon such a distant contingency, is to perpetuate the estate in the family of *J. S.*, to preserve a remainder in *J. D.*, which probably may never vest.

[The Duke of *Marlborough* devised his real estates to trustees, in trust, for several persons for life, with remainder to their first and other sons in tail-male successively; but directed his trustees upon the birth of a son of each tenant for life, to revoke the uses before limited to the respective sons in tail-male, and to limit the premises to such son for his life, with immediate remainders to the respective sons of such son in tail-male. It was holden, that this clause of revocation and re-settlement, was void, as tending to a perpetuity, and repugnant to the estate itself.]

A. devised his manors, messuages, &c., to the *Drapers* company, and their successors, upon trust to convey to *B.* for life, and to his first son, and all other his sons for life, and to their issue male for life; and for want of such issue to *J. S.*, for life, and to his issue male for life, &c., and so to a great number of them for life, and so to convey *toties quoties*; and the court held this attempt to make a perpetual succession of estates for life to be vain and impracticable; however, that there ought to be a strict settlement made, and the intent of the testator followed as far as the rules of law will admit of, and therefore directed a settlement to be made, so that such who were in being should be only tenants for life: but where the limitation was to a son not in being, there he must be made tenant in tail-male.

[A testator, after other devises, gave his estates to his nephew *William Brown*, eldest son of his brother *R.*, and his assigns for life, remainder to his first and other sons in strict settlement, and for want of such issue, then to the second son of his said brother for life, and after the death of the said second son of his said brother *R.*, then to the first son of the body of such second son of his brother, then lawfully begotten, or to be begotten, and to the heirs male of the body of such second son lawfully to be begotten, and for default of such issue, to the third, fourth, and fifth, and every other son and sons of the said second son of the said *R.* (according to their seniority), and to the heirs male of the bodies of the said third, fourth, fifth, and other sons of the said second son of the said *R.* lawfully to be begotten, the eldest, &c. to be preferred before the younger, &c. and for want of such issue, then, &c. And the testator did declare, that the reason of his settling and limiting his estates as aforesaid was, *because he desired to have the same continue in his name and blood, so long as it should please God to preserve the same.* The testator's brother had only one son *W.* born in the testator's lifetime, but he had a second son *T.* born after the

Spencer v.
Duke of
Marlborough, 5 Br.
P. C. 592.

2 Vern. 737.
Humberston
and Humberston
decreed. [1 P.
Wms. 332.
S. C. Godolphin v.
Godolphin,
1 Vez. 21.
S. P.]

Chapman v.
Brown,
3 Burr. 1626.

the testator's death, and in the lifetime of *W.* *W.* died without issue, and then the second son entered and suffered a recovery. And the question was, Whether *T.* the second son, who was not born till after the death of the testator, took an estate-tail, or only an estate for life? And it was contended by those who argued against the recovery, that *T.* the second son was only entitled to an estate for life, for that though there was an ambiguity in wording the devise, to take place immediately after the death of *R.*'s second son, it evidently arose from a line being inadvertently left out by the person transcribing the will. The devise immediately after the death of *R.*'s second son, was "to the *first son* of the body of such second son, and to the heirs male of the body of such;" thus far the transcriber copied right, but here he plainly omitted the following words, "first son lawfully to be begotten, and for want of such issue, then to the second son of the body of such second son of my said brother *R.* lawfully to be begotten, and to the heirs male of the body of such;" if these words had been inserted, the clause they said had been quite clear, sensible, and methodical. These words they contended ought to be supplied on the evident intention. On the other side it was contended that, as the devise stood "to the *second son* of *R.* for life; and after his decease, to the first son of his body, and the heirs male of the body of such second son," it was unquestionably an estate-tail. But the court, consisting of Lord *Mansfield* and Mr. Justice *Wilmot*, the other judges being absent, held, that *T.* the second son took an estate-tail; that they could not insert the limitations supposed to be left out, and as the will stood, there was no question in the case. But they said, if the omitted limitations could have been supplied by construction, they thought the unborn son of an unborn son could not have taken; and that, to effectuate the general intention of the testator, the word "*son*" should be construed a word of limitation, and an estate-tail given to the second son of *R.*

Nichol v.
Nichol, 2 Bl.
Rep. 1152.

A. devised all his real estates to trustees to the use of the *second son* of *B.* begotten or to be begotten during the life of such second son; and after the death of such second son, or in case he should inherit his paternal estate by the death of his elder brother, then to his *second son* lawfully to be begotten, and his heirs male; and for default of such issue, to the third, fourth, and other son and sons of the said *B.* severally and successively, according to the priority of birth, and the heirs male of the body of such third, fourth, and other sons respectively: and in default of such issue, to the same trustees and their heirs, to the use of the eldest son of *C.* during his life, and the heirs male of his body, remainder to the second son of *C.*, and the heirs male of such second son lawfully issuing, remainder to the use of the third, fourth, and other son and sons of the said *C.* severally and successively, &c. and to the heirs male of their respective bodies, and for default of such issue, he devised all his freehold estates before mentioned to *D.* and his heirs for ever. He also gave and bequeathed all his customary land to the said *D.*; and for default of such issue, to the

heirs male of the said *D.*, and for default of such issue to the customary heirs of the testator: the court certified unanimously that the estate vested in the second son of *B.* (when any such should be) by way of executory devise, and would in the mean time descend to the heir at law of the testator, and also that in order to effectuate the general intent of the deviser, such second son would take an estate *to him and the heirs male of his body*, determinable on the accession of the paternal estate.

Money was, previous to a marriage, covenanted to be laid out in the purchase of lands, to be settled to the use of *A.* for life, without impeachment of waste, remainder to *B.* for life, in bar of dower, remainder to the use of the children of the marriage, *subject to such powers, limitations, and provisions as A. by deed or will should appoint, and for want of such appointment, then as B. should appoint, and in default of such appointment, to the use of their children, and in default of issue, to A. in fee.* *A.* had several children by *B.*, but two daughters survived them. *A.* by his will, in execution of the power in the settlement, directed part of a sum of money to be laid out in the purchase of estates, to be conveyed in trust for his daughter *M.* *during her life*, for her separate use, remainder to trustees to preserve contingent remainders, remainder to all and every the *child and children* of his daughter as tenants in common, with remainders over. And one question on this part of the case was, whether the gift to *M.* for life, with remainder to her children, was a good execution of the power? And it was acknowledged that it was not a good execution *as to the children*, but was so far void; and then the question was, whether if the appointment was bad on account of the excess, the whole should be considered as unappointed. *His Honor* stopped the argument of this point, by asking, whether it should not go by *cypres*? and cited the case of *Chapman v. Brown*, stated *supra* as an authority.]

Pitt v. Jackson, 2 Br. Ch. Rep. 51.

seems, is not applicable, where the subject of a power is *personal estate*. 2 Vez. jun. 357.

The doctrine of *cypres*, it seems, is not applicable, where the subject of a power is *personal estate*. Routledge v. Dorrell,

A. devised all the rest of his personal estate by leases, in trust, or otherwise, to his three nephews *A.*, *B.*, and *C.*, and makes them executors, and wills, that they shall give bond to each other, that in case either die without issue of his body, to leave at their death all the said chattels and personal estate to the survivors and survivor of them; and the bill was to have the said bonds given, but was dismissed, being an attempt to entail a personality.

Abr. Eq. 207. Williams and Williams. A pecuniary legacy cannot be limited after a dying

without issue. 1 Bur. Rep. 272.

[And that the limitation of a personal estate to one in tail vests the whole in him is proved by many cases.

Stratton v. Payne, 3 Br. P. C.

257. Peiham v. Gregory, 5 Br. P. C. 435. Duke of Montague v. Lord Beaulieu, 6 Br. P. C. 255.

Where one devised that all his money in the government funds should be laid out in the purchase of lands, and settled on his eldest son *A.* and *the heirs male* of his body, remainder to the second son *C.* and the heirs male of his body; and bequeathed the rest of his personal estate to *A.* and *the heirs male of his body*, remainder

1 P. Wms. 290. Scale v. Scale, Pre. Chan. 421.

remainder over in the same manner; Lord Chancellor held, that the personal estate, (*viz.* the residue after what was to be laid out in purchase of lands,) could not be entailed, but the whole vested in the eldest son.

Dod v.
Dickinson.
Vin. vol. 8.
p. 451.
pl. 25.

So, where long Exchequer annuities for 99 years were given by will to trustees for the residue of the term, *in trust* for *E.* for so many years of the said term as she should live, afterwards to the plaintiffs for so many years of the said term as they or the survivor of them should live, and after the decease of the survivor *in trust* for the *heirs of their bodies* lawfully begotten, for all the residue of the said term, and for default of such issue, in trust for the defendant; Lord Chancellor *King* held the remainder over to be void, and that the whole vested in the plaintiffs to whom the limitation was for life, with remainder to the heirs of their bodies; and accordingly the annuities were decreed to be sold, and the money to be paid to the plaintiffs. In this case the devise was only *in trust*, and yet the rule was the same.

1 Vez. 133.
151. But-
terfield v.
Butterfield.

So, where a testator by his will devised that 400*l.* should be put out on good security for his son *T.* that he might have the *interest* of it for *his life*, and for the lawful heirs of his body, and if it should so happen that he should die without heirs, it should go to his youngest son *J. B.* Lord *Hardwicke* decreed that the whole vested in the first taker, and the limitation over was too remote.

Daw v.
Fitt (since
Earl of Chat-
ham) and
Western,
heard at the
Rolls July
1766.

Again, *R. T.* by will gave the *profits and half yearly dividends* of 4000*l.* capital bank stock to Sir *W. P.* during his life; together with the income and payments of six annuities payable at the Exchequer, to receive the payments during his life. And gave his dwelling-house in *London* (being leasehold) and the use of all the furniture and household linen therein, to *M. C.* during her life: and gave to *L. A. P.* (daughter of Sir *W. P.*) his dwelling-house and estate at *O.* and the use of all the goods, furniture, and linen there, together with all the cattle and cart horses, and the utensils in husbandry, as well as some other estates and leasehold houses, during the term of her natural life. And after the death of *M. C.* he gave to *L. A. P.* his dwelling-house in *London*, and the use of all the goods therein during her life. And after the death of Sir *W. P.*, he gave to *L. A. P.* the dividends on the 4000*l.* bank stock, and all the payments growing due on the said Exchequer annuities during her life; and after her decease he gave, bequeathed, and devised all the afore-mentioned land, houses, bank stock, and Exchequer annuities, to the heirs male of her body lawfully begotten for ever; together with all the furniture in both his houses: and for want of such issue, he gave and bequeathed all the said respective estate, bank stock, and annuities unto *W. D.* for life, remainder to the heirs male of his body, remainder over.

Upon the death of *R. T.*, *L. A. P.* entered on the estates devised to her, suffered a recovery, and sold the real estates: afterwards she devised and bequeathed all her real and personal estate to the said Sir *W. P.* (her father), his heirs, executors, and administrators. Her father surviving her, by his will, after giving several legacies, gave and devised all his real estates, and all the re-
sidue

fidue of his personal estate (which residue included the leasehold estates, furniture, bank stock, and annuities devised as above to *L. A. P.*) unto the defendant *W. P.* his heirs, executors, administrators, and assigns. After the death of Sir *W. P.* the plaintiff *W. D.* claimed the leasehold estate, bank stock, and Exchequer annuities, by virtue of the remainder limited to him in the will of *R. T.* But the Master of the Rolls held the limitation over to *W. D.* to be void, and that the whole vested in *L. A. P.*, and therefore dismissed the plaintiff's bill.

But upon a re-hearing before the Lords Commissioners of the Great Seal, they reversed the order of dismissal, and decreed, that the plaintiff should have the benefit of the said leasehold estates, bank stock, and Exchequer annuities during his life. Afterwards, however, upon an appeal to the House of Lords, the Lords reversed that decree, and thereby established the decision of the Rolls.

June 1770.
Vide Earl
Chatham
v. Tothill,
6 Bro. Parl.
Ca. 457.
1771.

Again, *A.* possessed of a considerable real and personal estate, (among other bequests) made one in the following words, "and further I hereby appoint my said trustees to lay out at interest, upon real and personal security, as they shall think proper, the sum of 4000*l.* sterling, part of my said real and personal estate, and to make payment of the interest of the said sum of 4000*l.* only to *R. G.* the younger son of the said *R. G.* during all the days of his natural life, and to make payment of the principal sum itself to the heirs to be lawfully procreate of his body; but declaring that the above interest shall not be affectable by the debts or deeds of the said *R. G.* (the son), and in the event of his death, without lawful issue of his body, or of his selling, assigning away, or otherwise disposing of the above interest, or any part of it, my will is, that the said sum of 4000*l.* together with 1500*l.* sterling further, making in all the sum of 5500*l.* sterling, shall pertain and belong to *J. H. W.*" One question was, Whether the remainder over of the 4000*l.*, and the legacy of 1500*l.* after the death of *R. G.* (the son) without issue of his body, were not too remote? It was argued in support of the limitation, that it was good, from the manifest intention of the testatrix, that it should take place upon the event of (the son) *R. G.* dying without leaving lawful issue. But on the other side it was contended, that the 4000*l.* was an estate-tail in money executed in *R. G.* the first taker, and the cases of *Butterfield v. Butterfield*, 1 *Vez.* 133. and *Daw v. Pitt*, *supra*, were cited, and it was said, that the case was too strong to admit of circumstances of the intent of the testatrix to contradict it. And *per* Lord *Thurlow*, With respect to the 4000*l.* personality, the cases of *Butterfield v. Butterfield* and *Daw v. Pitt* have confirmed the doctrine upon that subject, that it is too late now to argue upon the distinction of principal and interest, or to insist upon circumstances of the intent; the rule must take place with respect to the 1500*l.* that fell under the same objection. And his lordship decreed the remainder over too remote.

Glover v.
Strothoff,
2 Br. Ch.
Rep. 33.

Again, where *S.* by his will gave as follows, "*Item*, I give and bequeath to *T. M. S.* during the term of his natural life, the in-

Robinson v.
Fitzhebert,
2 Br. Ch.
Rep. 127.

terest of 1000*l.* 3 *per cent.* consol. bank annuities, to commence the day after my death, to be regularly paid from time to time, in ten days, or as soon as possible after the same becomes due: At his decease it is to *devolve* to the *heir* of his body lawfully begotten, and in default of issue, I give and bequeath the same to the heirs of *A.* that shall be then living, in equal shares to be divided:" the Master of the Rolls held, that the legacy vested absolutely in *T. M. S.*

But where personalty is not so given, as that the words would create a clear tenancy in tail in land, the law is otherwise.

Wilson v.
Vansittart,
Ambl. 362.

Therefore where one, being possessed of a considerable personal estate, made his will in *India*, of his own hand-writing, and gave several legacies, and *inter alia*, to the heirs of his brother *R. W.* 300*l.*, and gave the residue of his estate to his brother *I. W.*, and to his heirs male, *equally to be divided among them, share and share alike*; three questions arose, first, Whether *I. W.* should take the whole, and the words *equally to be divided*, be rejected? Secondly, Whether *I. W.* and his sons should take as tenants in common? Thirdly, Whether the father should take for life, and after his death the residue should go to all his sons equally? The Lords Commissioners *Smythe* and *Bathurst*, were clear of opinion that, according to the true construction, the father should take the whole for life, and then it should go to his sons equally.

Jacobs v.
Amyatt,
4 Br. Ch.
Rep. 542.

Again, *D.* being resident in *Calcutta*, and possessed of *only* personal property, made her will, and after giving some legacies, gave all the rest, residue, and remainder of her estate, both real and personal, unto *L.* to be placed at interest until her age of 21 years, or day of marriage, and then the whole thereof, together with the interest accumulating thereon, to be paid to and for her use, during her natural life, and from and immediately after her decease, she gave, devised, and bequeathed the same unto the heirs of her body lawfully begotten, *equally to be divided between them*, share and share alike; and in default of such issue, or the death of the said *L.* before her said age of 21 years, or day of marriage, she then gave, devised, and bequeathed the said residue and remainder of her estate, unto her, the testatrix's brother. The question was, Whether under this will *L.* took an estate for life or an absolute interest in the personal property? And it was decreed at the Rolls that *L.* took only an estate for life, in the property in question. And that decree was affirmed on appeal to the Chancellor.

Knight v.
Ellis, 2 Br.
Ch. Rep.
570.

And it hath been resolved, that if the first estate for life be a trust estate, and the remainder to the heirs of the body a legal estate, the latter will take effect; because if such limitation had been applied to land, it would not have created an estate-tail.]

2. By Incertainty in the Description of the Thing devised.

Lev. 130.
Sid. 191.
Raym. 97.
Bowman

Devises are void and rejected where the words of the will are so general and uncertain, that the testator's meaning cannot be collected from them; and therefore where a man by will, gave *all*

to his mother, all to his mother, it was adjudged that these general words did not carry the lands to the mother; for since the heir at law has a plain and uncontroverted title, unless the ancestor disinherits him, it were severe and unreasonable to set him aside, where such intention of the testator is not clearly evident from the will; for that were to set up and prefer a dark and at best a doubtful title to a clear and certain one.

If one having lands in fee, and other lands for years, devises all his lands and tenements, the fee-simple lands only pass: but if a man had leases for years only, and no fee-simple lands, by the devise of all his lands and tenements (*a*), the leases for years pass, for otherwise the will would be merely void.

and Milbank.

Rose v. Bartlett, Cr. Car. 293.
(a) Day v. Trigg, 1 P. Wms. 286. S. P.

[A testator being seised in fee, and possessed by lease of lands in *D.*, devised all his lands in *D.* whereof he was seised, possessed of, or any ways interested in, to *A.* for life, remainder to *B.* in tail, remainder to *C.* for life, with power to make a jointure, remainder to trustees to preserve contingent remainders, &c. It was resolved, that the leasehold passed with the freehold, and that, by reason of the words *possessed of or interested in*, which properly refer to a leasehold estate, and distinguish this case from that of *Rose v. Bartlett, supra*, where these words are not to be found.]

Addis v. Clement, 2 P. Wms. 456.

So, if a man being seised of a messuage in *A.*, and of a messuage and several lands in *B.*, devises to *J. S.* his house in *A.* with all other his lands, meadows, pastures, with all and singular their appurtenances whatsoever in *B.*, yet the house in *B.* shall not pass; for though by a feoffment or lease of lands in *D.* houses shall pass, because to be taken most strongly against the feoffor, &c. and the land passing, the house thereupon must also pass; yet wills are to be taken according to the intention of the devisor; and when he devises his house in *A.* and lands in *B.*, it cannot be presumed that he would have more pass than by the words is expressed.

2 And. 123.

If a man is seised of lands in a vill, and in *A.* and *B.*, two hamlets within the same vill, and devises all his lands in the vill, and in *A.*, and dies, no part of the land in *B.* shall pass; for his naming one hamlet only, fully shews his intent, that the lands in the other should not pass.

Dyer, 261.

But where a man having two several moietyes of lands by purchase from the same person, one lying in *Kent*, and the other in *Essex*, devised all his moietyes in *Kent*; it was held, that both passed, for the words being *all his moietyes* they cannot be satisfied with one moiety only.

Bulst. 117.
2 Bulst. 176.
Hob. 173.
vide Noy, 112. Cro. Eliz. 658.

If one seised of land, called *Hayes Land*, lying in two villis, viz. *A.* and *B.* devises all his land in *A.* called *Hayes Land*, to his youngest son and his heirs, and in another part wills, that if his said son dies without issue, that his wife shall have *Hayes Land*, and dies, and the son dies without issue, the wife shall have only that part of *Hayes Land* which lies in *A.* because no more was devised to the son: but per *Popham*, if the devise had been to the eldest son, and if he dies without issue, perhaps he should have

Cro. Eliz. 674.

had all, because the eldest son had all, part by devise, and part by descent.

Roll. Abr.
613.
Cro. Car.
447. vide
Styl. 261.

If a man is seised in fee of two houses in *D.* adjoining the one to the other, and the one is in the possession of *A.* and the other in the possession of *B.*, which is also the corner house in the street of the town; and he devises his corner house in the possession of *A.* and *B.*; by these words, only the house which is in the possession of *B.* shall pass, which is the corner house, and not the other house which is in the possession of *A.*, though it be next adjoining thereto; for his intent appears to be so.

2 Leon. 120.
Thorp and
Thompson.

A. sold land to *B.*, but before a conveyance was executed, *B.* sold the same lands to *C.*, and then *A.* conveyed to *C.*, and *C.* being thus seised, devised the land to his younger son in these words, *I bequeath to R. my son all my land which I purchased of B.*, whereas in strictness of law he purchased them from *A.*, who conveyed them to him; yet this was allowed to be a sufficient description of the land, and, consequently, a good devise of it, because the purchase was really made from *B.*, the money being paid to him.

Cro. Car.
129. Jon.
195. S. C.

If one devises his house wherein *J. S.* dwells, called *The White Swan in Old-street*, to *J. N. &c.* and dies, and at the time of his death and making the will *J. S.* occupied the entry only, and three of the upper rooms of the house, and others occupied the garden and other parts of the house; yet all the house passes; for the house imports the whole house, and the sign of the *White Swan* makes it still more certain.

Cro. Car.
57. 1 P.
Wms. 603.
[(a) But see
the case of
Doe v Mar-
tin, 2 Bl.
Rep. 114 S.
where, in
consequence
with the
manifest in-
tent of the
testator,

If a man is seised of a messuage and two acres of land in *A.*, and of two acres of meadow in *B.*, and hath used and occupied the two acres of meadow, being four miles distant from his said house, together with his said house and lands in *A.*, and devises the house *cum omnibus & singulis pertinentiis suis adinde spectan.* to *J. S.*, the two acres of meadow shall not pass; for by the words *cum pertinentiis* lands pass not (a), but such thing only as may be properly appertaining; otherwise, if the words had been *cum terris pertinentibus*, for then the lands used therewith should have passed.

land was holden to pass with a house under the word appurtenances. And in the case of *Gulliver v. Poyntz*, 3 Will. 141. under a devise of *messuages, with all houses, barns, stables, stalls, &c. that stand upon, or belong to the said messuages*, lands which were purchased with the messuages, and which, as well as the messuages, were in the testator's possession at the time of making the will, were allowed to pass.]

Chan. Ca.
262.

If *A.* devises several pecuniary legacies, and also some lands, and then devises all the rest and residue of his money, goods, and chattels, and other estate whatsoever, to *J. S.* whom he makes executor, he having other lands, they shall pass by the will.

Roll. Abr.
613.

But if a man seised in fee of three tenements, and possessed of divers goods, and of a lease for years, devises one tenement to one of his sons, and another tenement to one of his daughters, and then adds, *Item, I make my two sons executors of all my goods, moveable and immoveable, and all my lands, debts, duties, and demands*; by this clause, no estate in the three tenements of which
the

the devisor was seised in fee, passed to the executors by force of the words, *and all my lands*; because that these words might well be satisfied by the lease for years of land which passed by it.

A. devised in the following manner: *I make my niece executrix of all my goods, lands, and chattels*; the testator had a real and personal estate, but no leases or interest for years in any lands whatsoever; and the question was, Whether any, or what estate passed in the lands, by this devise? And my Lord Chancellor was clearly of opinion, that the real estate did not pass by these words; and that the word *lands* was not (as objected) useless, and to be rejected, for that in all probability there might be rents in arrear of those lands, which would pass to the niece by her being made executrix.

Abr. Eq.
209, 210.
Piggot and
Penrice, Pr.
Ch. 471.

If *A.* devises certain lands to his youngest son in fee, and devises all his lands in *D.* to his wife for life: *Item*, I give to her for life the lands which I hold of *G. T.* *Item*, I give to her all the lands which I purchased of *J. S.* *Item*, I give my lands to my son *E.* and his heirs for ever; not only the lands purchased of *J. S.*, but also the reversion of all the others pass by these words.

Skin. 120.
pl. 5. Bar-
row and
Gameam.

If *A.* being seised of the manor of *B.*, and of other lands in the county of *S.*, devises the manor of *B.* for six years, and part of the other lands to *J. S.* in fee; and then comes this clause, and the rest of my lands in the county of *S.*, or elsewhere, I give to my brother, *W.* by this devise he shall have the reversion of the manor.

Wheeler v.
Walroon,
Allen, 28.
3 Atk. 492.
S. C. cited,
and S. P.

A. seised in fee, devised a certain house by name to *J. S.* for life; and by another clause he devises to his wife, the better to enable her to pay his legacies, all his messuages, lands, tenements, and hereditaments, *not above disposed of.* Adjudged, that by these words, the reversion of the house devised to *J. S.* passed.

2 Vent. 285.
Willow and
Lydcot, ad-
judged upon
a writ of
error in the
Exchequer-
chamber.

Carth. 50. S. C. where it is said to have been adjudged in King James II.'s time, that the reversion did not pass; but a note is added, that these were king James's judges, and that Mich. 1 W. & M. it was adjudged, that the reversion passed; which judgment was affirmed in the Exchequer-chamber by all the judges; and the rather, because it appeared that the heir at law had 20*l.* per annum devised to him; so that he being taken notice of, the intent was more apparent. *Vide* Lev. 212. S. P. adjudged, and 3 Mod. 228. which seems contrary, but has been denied to be law.

A. seised in fee, devised Black Acre to *B.* for life, and devised to *C.* all his lands not before devised, to be sold, and the money to be divided between his younger children: the question was, Whether the reversion of Black Acre passed by the devise of all his lands not before devised? And it having been referred to the judges of the Common Pleas, they unanimously agreed and certified, that the reversion was well devised.

2 Vern. 461.
Rooke and
Rooke, de-
creed ac-
cordingly.
1 Fr. Ch 202.
S. C.

[*A.* having devised a farm to *J. S.* for life, and after other legacies, devised all other his personal estate, lands, tenements, and hereditaments, not before devised, to the defendant; it was made a question, Whether the reversion of that farm passed by this general devise? *Per cur.*—The reversion well passed.]

Kingsman
v. King-
man,
2 Vern. 559.

A. by virtue of several settlements, being tenant in tail after possibility of issue extinct, of some lands, remainder in fee to trustees,

2 Vern. 621.
between Sir
Littton

Strode and
Lady Russell,
dececd by
my Lord
Chancellor,
assisted with
the Master
of the Rolls,
Trevor,
C. J. and
J. Tracey.

trustees, in trust for him and his heirs, and as to some other lands, being tenant for life, remainder to his first and other sons, remainder to trustees in fee, in trust for the right heirs of *B.*, whose heir *A.* was, and as to other lands, being tenant in tail, remainder to the right heirs of his father, whose heir he likewise was; and being likewise seised of a very considerable real estate of his own purchase, and possessed of a large personal estate, made his will, and devised some part of his lands to his wife for life, and gave several legacies, and having no issue, devised all other his lands, tenements, and hereditaments, *out of settlement*, to his nephew, provided he took on him his surname, subject to raise 4000*l.* in case the testator left a daughter; and it was held, that all the estates thus settled passed by the will, notwithstanding the words *out of settlement*, for the word *hereditament* comprehends a remainder or reversion, as well as an estate in possession.

Ab. Eq.
211. Chester
and Chester,
dececd by
my Lord
Chancellor,
assisted by
Raym. C. J.
Reynolds,
C. B. and
Price, J.
3 P. Wms.
56. S. C.

So, where *A.* being seised in fee of lands in *D.* upon the marriage of his eldest son, settled those lands on him in tail male, remainder to his own right heirs; and being seised in fee in possession of other lands in *M.*, *L.* and *N.*, devised all his messuages, lands, tenements, and hereditaments in *M.*, *L.*, *N.*, or *elsewhere*, not by him formerly settled, for the payment of his debts; and after debts paid, then to *J. S.* a second son, and his heirs for ever, and died, and soon after the eldest son died (not having barred the remainder) without issue male, but left several daughters; it was held, 1st, That the word *elsewhere* was a sufficient description of the lands in *D.*, though of greater value than those in *M.*, *L.*, and *N.*; that it was of itself a significant and expressive term; and the rather so in this case, because there were no lands or outskirts not particularly enumerated, to which it could be applied, but to those in *D.* 2^{dly}, That the words *messuages, lands, tenements, and hereditaments*, were sufficient to pass the reversion of the lands in *D.*, notwithstanding the exception, or restrictive words *not formerly settled*.

Freeman v.
Duke of
Chandos,
Cowp. 363.

[One devised all his estate, &c. in the counties of *G.* and *W.*, and *elsewhere in the kingdom of England*, to trustees, subject to certain charges thereon, and limitations in his marriage settlement, in trust to stand seised of the said estates in *G.* and *W.*, or *elsewhere*, to certain uses. His estates in *G.* and *W.* were his only estates charged or mentioned in his marriage settlement; but he was also entitled to the reversion of certain estates in the counties of *O.* and *M.* It was holden, that this reversion passed by the words, "*elsewhere in the kingdom of England*."

Atkyns v.
Atkyns,
Cowp. 808.

One seised for life, with remainder in tail to his first and other sons, of a considerable estate in the county of *N.*, and being also seised in fee of the manor of *C.*, and a small estate at *P.* in the county of *G.*, and entitled to the reversion in fee of another estate in that county, after several estates-tail in different persons, one of whom had a son aged eighteen years; devised "all that his manor of *C.* &c., and also all that his capital messuage, and all and every "his lands, tenements, and hereditaments whatsoever, situate and "being in or near *P.* or elsewhere in the said county of *G.*, to his "executors,

“ executors, in trust to sell, and to divide the money arising from “ the sale equally among his younger children,” of whom he had three. It was resolved, that this remote reversion passed to the trustees.

But notwithstanding these cases, general sweeping words will not carry a reversion, where the testator’s intent manifestly appears to the contrary from the whole complexion of the will.] Strong v. Teat, 2 Burr. 912. 1 Bl. Rep. 200. S. C. 5 Br. P. C. 496. S. C. Roe v. Avis, 4 Term Rep. 605.

If *A.* devises lands to *B.* in *D.*, *S.*, and *T.*, and all his lands elsewhere, and he hath a mortgage of lands, not lying in *D.*, *S.*, or *T.*, which is of more value than the lands in *D.*, *S.*, and *T.*, the mortgaged lands will not pass, for he could not be thought to mean to comprehend lands of so much value, under the word *elsewhere*, which is like an *&c.* that comes in *currente calamo*. 2 Vent. 351. Sir Thomas Littleton’s case, decreed; but the reporter says there were other
 circumstances in the case, which shewed that it was not his intention that the mortgaged lands should pass; and Vern. 3. S. C. it appears, that there were some small parcels of land not specified, and of the same nature of those devised; to which the court held the word *elsewhere* was applicable, and not to the mortgaged lands, which were of a different nature, and of greater value; and that the testator had charged the lands devised with a rent-charge of 8*ol. per annum*, which he could never intend should issue out of lands which were every day redeemable.

[Where a testator seised of lands in fee, and possessed of a term for years in *B.*, devised all his lands, tenements, and *real estate* whatsoever in *A.* and *B.*, or elsewhere, of which he was *any way* seised or entitled to, to *J. S.* and his heirs, and in a subsequent clause of his will disposed of the rest of his personal estate, and of all his *mortgages, bonds, specialties, and credits*; it was adjudged, that the term did not pass to *J. S.*] Davis v. Gibbs, 3 P. Wms. 26.

By a general devise of all lands, tenements, and hereditaments, mortgages in fee, though forfeited, will not pass; nor will they pass by such a general devise, though the equity of redemption is *after* the making of the will foreclosed or released. 2 Vern. 623.

A. having settled all his estate of inheritance upon his wife for life, for her jointure, makes his will, and thereby devises several pecuniary legacies to several persons, and then says, all the rest and residue of my estate, chattels real and personal, I give and devise to my wife, whom I make sole executrix; and the only question was, Whether by this devise the reversion of the jointure lands passed to the wife? And my Lord Keeper, having taken time to consider of it, delivered his opinion, that it did not, because the precedent and subsequent words explain his intent, to carry only his personal estate; for in the first part of his will, having given only legacies, and no land whatsoever, the words all the rest and residue of his estate are relative, and must be intended estate of the same nature with that he had before devised, which was only personal; for having before given no real estate, there could be no rest or residue of that out of which he had given away none; then the words *chattels real and personal* explain the word *estate*, and shew what sort of an estate he meant, and make the devise as if he had said, all the rest of my estate, whether chattels real or personal, *&c.* and so confine and restrain the extended sense of the word *estate*. Abr. Eq. 211, 212. Markant and Twifden, Gibb. Eq. Rep. 30.

Ridout v.
Pain,
3 Atk. 486.

[But where a testator devised to his wife, to whom he had before given life-estates in part of his lands, all the rest, residue, and remainder of his goods, chattels, and personal estate, *together with his real estate, not therein before devised*, it was holden, that these words, *together with the real estate*, carried the land and inheritance; for though there are cases where it has been doubted, whether the word *estate* joined to goods, &c. will carry the real estate, yet, when a testator says, *together with my real estate*, it puts it out of all doubt. In the case of *Markant v. Twisden*, *supra*, the words were *chattels real and personal*; and chattels real are not called so, as being real estate, but because they are extractions out of the real, as Lord Chief Justice *Holt* called them.]

3. By Incertainty in the Description of the Person to take.

Abr. Eq.

If *A.* devises lands to the eldest son of *J. S.* by the name of *William*, when in truth his name was *Andrew*, the devise is (a) good.

son of *J. S.* is good, or to his second or youngest; so is a devise to the wife of *J. S.* or though she be called *Em.* or *Emlyn*, and to Robert Earl of, &c., though his name was *Henry*. Co. Lit. 3.—A devise to the stock, family, or house, is good, and it shall be intended of the heir. Hob. 33. Dy. 333. b. [Upon the same principle, if lands be devised to the *posterity* of *A.*—the lineal heir, if there be any, shall take them under the word *posterity*; but if *A.* die without issue, and there be no lineal heir of *A.*, the collateral heir of the whole blood shall take them. 2 Eq. Ca. Abr. 290-7.—And a devisee may be described as the next of the name of the testator, and the next relation of his name, whether it be male or female, shall take as devisee described thereby. Bon v. Smith, Cro. El. 532.—So, a devisee may be described as next of kin. Thus it was adjudged, where one devised lands in tail, the remainder *to the next of kin of his name*, that his brother's daughter should take by that description. Jobson's case, Cro. El. 576.—And nearest relation of the name is likewise a good description of a devisee, and operates as *nomen collectivum*: and in these cases where *nomina collectiva* are used to describe the devisee, the term used comprehends all the testator's family that are nearest to him in the degree mentioned. Pyot v. Pyot, 1 Vez. 315.—And if the deviser explains who he means by nearest relation, persons may take under that description who are not strictly so circumstanced in point of kindred.—As, if lands were devised to be divided between the nearest relations of the testator; namely, the Greenwoods, the Everetts, and the Downs; the Everetts it seems might take, though not in the same degree of relation as the Greenwoods and Downs, nor within the degree of nearest relationship. Greenwood v. Greenwood, cited in 1 Br. Ch. Rep. 52.—If one, being married, make his will, and thereby describe his devisee by the term, nearest relation, according to the statute of distributions, his wife cannot take thereby; for she is no relation to her husband in the sense in which that word is here used, because it is transferred to a personal sense, and as if he had said kindred; and kindred, in the statute, means kindred by blood only, and the wife is no relation by blood or affinity. The wife *non affinis est sed causa affinitatis*; *affinis ab eodem stipite*. Davies v. Bailey, 1 Vez. 84. Wooley v. Johnson, 3 Atk. 759. Skin. tit. Cognatio parentela. Calvin's Lexicon.—And there would be no difference in such a case as that last mentioned, whether the terms used by the testator were, my relations generally, or, my own relations. In both cases, relations by blood only are included. And if the reference to the statute of distributions be omitted in such a devise, the wife cannot even then take within the description of a near relation. For, in the case of Thomas and Hare, Lord King determined, upon the authority of Lord Macclesfield, in the case of Brown and Brown, that the word "relations" should be confined to such relations as were within the statute of distributions, because of the uncertainty of the word relations. 2 Eq. Ca. Abr. 332. q. 368. Ca. temp. Taib. 251.]

Pitcairne v.
Droft: et al.
Finch. Chan.
Rep. 403.
et v. d. Dal-
lison, 78, 8.
Onen, 35.
Rives's
case.
1 Atk. 410.

[So, where one, having a reversion in fee expectant on an estate tail, devised it to *William Pitcairne, eldest son of Charles Pitcairne*, in tail male, remainder over, and died; it was insisted, on a bill exhibited by the eldest son, to have the writings, and to receive the profits, &c. that the devisee had no title, because his name was not *William* but *Andrew*; but the court was of opinion that the plaintiff should have relief: the reason of which was, that there were other words, *viz. eldest son of*, &c. sufficient to point him out with certainty.

So,

So, where a devise was to *Margaret*, the daughter of *W. K.*, and her name was *Margery*, it was held that she should take thereby, *quia constat de persona*, by the description.

So, if one devise land to the wife of *J. S.*, and *J. S.* die, and she take to husband *J. D.*, and then the devisor die, she shall take the land; and yet she is not the wife of *J. S.* when the devisor dies, nor shall she take it as his wife: but the intent is, that she who *was* the wife of *J. S.* at the time of making the will should have it, and the person is clear by the description.

Again, if a man had devised land to *Alexander Nowel*, dean of *St. Paul's*, and to the chapter there and their successors, and *Alexander* had died, and a new dean had been made, and afterwards the devisor had died, the land had vested in the new dean and chapter; and yet it would not have vested according to the words, but according to the intent; for the chief intent was to convey it to the dean and chapter and their successors for ever, and the single person of *Alexander Nowel* was not the principal cause, though it might have been one of the causes of the devise.

Upon the same principle it was decreed by Lord *Sommers*, where one, his wife being *enseint* with a child, (was taken sick and made his will, and, thereby, devised that if his wife should have a posthumous daughter she should have 500*l.*, &c.) had a daughter born, and afterwards died; that this daughter, though born in the life of her father, was a posthumous child within the meaning of the will.]

If a man has issue two sons, and devises his land to his son, without specifying which he means, this is void for the uncertainty; for to construe it a devise to the eldest, is to make it an impertinent devise, that being no more than *actum agere*; and to construe it a devise to the youngest, seems still more unreasonable, because that is to disinherit the heir at law without an apparent intention of the testator to warrant it, and to set up a doubtful title in destruction of a clear one.

If a man has two sons named *J.*, and devises to his son *J.* all his lands, this is a void devise for the uncertainty, unless it can be proved that the testator meant one of them in particular; by the elder son's being beyond sea, probably dead, &c. for these circumstances clear up the intent of the testator, and such averment is (a) admitted, because it is consistent with the will; and the construction and judgment thereon must be genuine, because taken from the words of the will.

If a man hath issue two sons and two daughters, and devises his land to his wife for life, and that after her death the same shall remain to his issue; this is a void devise as to the remainder; for having several children, it is (b) uncertain what issue intended.

to be law; and that it shall go to the eldest son, for issue is *nomen collectivum*; and so is 3

If a man has issue eight daughters by three several venters, and one son, and devises his land to his youngest daughter, the remainder to his son in tail, the remainder to his two daughters by the

Gynes v. Kembley, 1 Freem. 293.
10 Mod. 371.
1 Vin. Abr. tit. Dev. T. B. Pl. 2. Plowd. 344.

Vin. Abr. tit. Corp. G. 6. pl. 11. tit. Dev. W. c. pl. 4. Plowd. 344.

Jaggard v. Jaggard, Pre. Ch. 175.

Cro. Eliz. 742.

5 Co. 68.

(a) But for this wide head of Evidence.

Cro. Eliz. 742. Taylor and Sayer. (b) But vide Raym. 83. S. C. cited, and denied

Lev. 433. and

Palm. 303. vide Styl. 240.

middle venter for life, the remainder *proximo de sanguine* of the devisor, and dies, and after the eldest daughter has issue, and dies, and after the son, and all the other daughters, except the two daughters by the middle venter, to whom it was given for life, die without issue, the issue of the eldest daughter shall have it.

Raym. 82.
Bate and
Amberst,
adjudged.

If a man devises all his lands to one of his cousin *Nich. Amberst's* daughters, that shall marry a *Norton* within fifteen years, and dies, and *Nich. Amberst* having three daughters, one of them marries a *Norton* within the fifteen years; this is a good devise to her notwithstanding the uncertainty, and the law supplies the words, *who shall first marry*.

2 Vent. 363.

If a man devises lands to *J. S.* in trust for *A.* and the heirs of his body, remainder, to *B.* for life; and further wills that if *A.* die without issue, and *B.* be then deceased; then, and not otherwise, he gives the lands to *J. N.* and his heirs; though *A.* dies without issue, and *B.* survives; yet, after the death of *B.*, *J. N.* shall take, for the words, if *B.* be then deceased, express the testator's meaning, that *B.* should be sure to have it for life, and also shew when *J. N.* should have it in possession.

Vern. 362.
Huckstep
and Mat-
thews.

A. devises lands to trustees in fee, in trust to pay debts and legacies, and after those debts paid, then to sell; and if any of the testator's name would buy, such person to have the lands 200*l.* less than the value; one of the testator's name brings a bill for this benefit of pre-emption, but not till the testator had been dead twenty-five years; but the bill was dismissed; for if two of the testator's name should claim the benefit of the devise, who must have it?

2 Vern. 660.
Trafford
and Ashton,
decreed.

A. devised lands to trustees, in trust for his daughter for life, remainder to the second son of her body to be begotten in tail male, and so to every younger son; and in default of such issue male, to her eldest daughter, and to the first son of her body, taking upon him the name and arms of the testator; and adds further, that he did not by his will devise the estate to the eldest son, because that he expected that his daughter would marry so prudently, as that the eldest son would be provided for; the daughter married, and had issue a son, who died in twelve months after his birth; she afterwards had another son born, after the death of the first; this second must take according to the words of the will, though contrary to the intention of the testator.

Sid. 23.
51. Forster
and Ramsey.

A., *B.*, and *C.* being aliens and brothers, *A.* has issue a son, and *B.* and *C.* are naturalized, and *B.* purchases lands, and devises them to the heir of his brother *A.* and his heirs, and *B.* dies, leaving *A.* and his son; the devise is void for the uncertainty, who is intended thereby; for *A.* being an alien, can have no heir, or however being living, can have none during his life; but *per Glyn Ch. Just.* if it had been found that the son of *A.* was the reputed heir of *A.*, though *A.* was an alien, yet his son might have taken by this devise.

Hob. 29, 30.
Cownden
and Clerk,
Moor, 860.
S. C.

A man had issue a son and a daughter, the daughter was married, and had issue two daughters; the father devised, that all his lands should descend to his son, provided that if his son died with-
out

out issue of his body, then my land to go to my right heirs male of my name and posterity for ever; the son died without issue; and upon ejectment between the brother of the devisor and the daughters, this was held a void devise, because neither could claim under the description of the will; not the brother, because, though he was of his name, yet he was not his (a) heir; and though the daughters were his heirs, yet they were not of his name, and so not within the words of the will, and, consequently, the limitation void for the uncertainty.

be heir general, or complete heir: for instance, if lands are devised to the heirs of *J. S.*, and *J. S.* is living at the death of the testator, the devise is void, for *non est hæres viventis*: so, if lands are devised to the right heirs male of *J. S.*, and the heir of *J. S.* is a female, the devise is void; or if the devise were to the heirs female, and the right heir had been a male, it would be void in the same manner; to which purpose *vide Moor*, 860. Co. Lit. 24. b. 2 Leon. 70. Dyer, 99. Hob. 33. 1 Co. Archer's case. 1 Co. 103. Shelly's case. [Ford v. Lord Offulston, M. 7 Ann. B. R. Hargr. Co. Lit. 27. b. note. Dawes v. Ferrars, 2 P. Wms. 1. and Pr. Ch. 589. and Mr. Hargrave's notes in his Co. Lit. 24. b. 27. b. 164. a.] but notwithstanding these authorities, this doctrine has been shaken by the following more modern resolutions, in which it is held, that a special heir may take by purchase; and that a description of a person by the name of heir, though not heir general, operating with the intention of the testator, is sufficient to ascertain the person to take. *Vide Abr. Eq. 214, 215. Beaumont and Long. 2 Vern. 729. Newcomen and Barkham.*

If a man devises lands to *A.* and his heirs, during the life of *B.*, in trust for *B.*, and after the decease of *B.* to the heirs male of the body of *B.* now living, *B.* having one son then living; by this devise a remainder is immediately vested in the son, for the words *heirs male now living*, in a will, are a full description of the son, who then was the heir apparent of *B.*, and known by the devisor (who was his uncle and godfather) to be so.

but the judgment of reversal was reversed in the House of Lords. 2 Lev. 232. S. C. and per Levinz, this point was tried again upon a new ejectment; and like judgment given as at first in B. R. which was confirmed in the Exchequer-chamber, and likewise in the House of Lords, Vent. 334. S. C. by the name of Burchet and Durdant. 2 Vent. 311. S. C. Raym. 330. S. C. 3 Keb. 32. S. C. Pollex. 457. S. C.

[*S.*, after devising hereditaments to trustees for twenty-one years for the payment of debts, &c. settled the same on the first son of his body lawfully begotten, and the heirs male of the body of such first son lawfully issuing, and, for default of such issue, to his cousin *J. S.* for ninety-nine years, if he should so long live, remainder to his first and other sons in tail male, and, in default of such issue, remainder to the heirs male of the body of the testator's aunt *E. L.* lawfully begotten, and, for default of such issue, remainder to his own right heirs. The testator also gave a legacy to his said aunt *E. L.*, whereby he took notice, that she was living, and that she had three sons, *A.*, *B.*, and *C.*, to whom he gave a legacy of 500*l.* He likewise gave to *D. B.*, who was his heir at law, an annuity out of the said hereditaments of 150*l.* per annum, and to her children 500*l.* a-piece. Afterwards the testator died without issue, as did also *J. S.*; upon which the question was, Who was entitled to the testator's real estate, whether his heir at law *D. B.*, or *A.* the eldest son of the testator's aunt *E. L.*? And one objection taken to the claim of *A.* was, that *E. L.* his mother being living at the testator's death, there was no heir of *E. L.*, nor could be whilst she was living; and that heir, being a legal term, could be understood only

(a) This resolution is founded on a rule laid down in the old books, viz. That he who taketh by description or purchase as heir, must

2 Jon. 99. adjudged between James and Richardson in B. R. but reversed in the Exchequer-chamber;

Darbishon on dem. Long v. Beaumont, 1 P. Wms. 229. 1 Brown. Parl. Ca. 489.

only in a legal sense, unless some other word or words accompanying it should determine the sense otherwise, as *heir apparent*, or *heir now living*; and it was said, that the word *begotten* did not determine the sense to be special; because the word *begotten*, or to be begotten, had the same legal construction; and it did not appear that the devisor had any intention to confine the devise to the issue male of *E. L.* then living, much less to *A.* only, who would take as the heir described by this devise. But it was adjudged in the Exchequer, which judgment was afterwards reversed in the Exchequer-chamber, and that reversal reversed in the House of Peers, that *A.* was entitled under this devise: and the principal reasons upon which the court of Exchequer founded their judgment, and upon which the House of Lords affirmed it, were, because it was evident from the whole will, that he was the person manifestly designed to take by the appellation of the *heir* male of the body of the testator's aunt *E. L.* lawfully begotten, before the heir general of the testator, who was to take no more than an annuity so long as there should be issue male of his aunt; and then, although the word *heir*, in the strictest sense, signified one who had succeeded to a dead ancestor, yet, in a more general sense, it signified an heir apparent, which supposed the ancestor to be living. Then, when the testator also took notice, that *E. L.* the ancestor was living at that time, and gave her a legacy, he could not intend that the first son should take *strictly* as heir, which was impossible if *she* was living, but, as heir apparent he might intend him to take.

Goodright
on dem.
Brooking v.
White,
2 Blackst.
Rep. 1010.

Again, *B.* devised to *M.* his wife, *inter alia*, an annuity of 10 *l.* *per annum* charged upon the estates in question for eighty years if she so long lived, on condition that she claimed no dower; and, after the decease of *M.* his wife, devised annuities of 40 *s.* *per annum* each to his daughters *E. N.*, *M. T.*, and *A. H.* for ninety years, if they should respectively so long live; also to his daughter *M. W.*, the wife of *W.*, another annuity of 40 *s.* *per annum* for seventy years, if she and the testator's only son *R. B.* should jointly so long live, the said term of seventy years to commence at the expiration of the term of two years thereafter given in the estates to his said daughter *M. W.*, and the death of *M.* his wife, and, subject to the same annuities, gave the estates to his daughter *M. W.* for two years from and after his decease, with remainder to *R. B.* his son for ninety-nine years if he so long lived, and subject to such ninety-nine years term, he devised the same to his son *R. B.* and his heirs male, and to the heirs of his daughter *M. W.* jointly and equally, to hold to the heirs male of *R. B.* lawfully begotten, and to the heirs of *M. W.* jointly and equally, and their heirs and assigns for ever; and, for want of heirs male lawfully begotten of the body of the said *R. B.* at the time of his decease, he devised the same, charged as aforesaid, to the HEIRS and assigns of the said *M. W.*, lawfully begotten of her body, to hold to the HEIRS and assigns of the said *M. W.* for ever. He then devised a leasehold house to his daughter *J. S.*, and made his daughter *M. W.* sole executrix and residuary devisee of all
his

his personal and real estate. The testator died, leaving *M.* his widow, since deceased, *R. B.* his only son and heir, and five daughters, viz. *M.*, *I.*, *E.*, *A.*, and *M. W.*; and *R. B.* the son had, at the time the will was made, a son *R.* and two daughters; and *M. W.* the testator's daughter then had one son, and, after the testator's death, she had another son, both living, and no other children. On the death of the testator, *M. W.* entered into the whole of the estate, and held the same for two years, after which *R. B.* the son entered, and held the whole during his life. *R. B.* died, leaving his only son *R.*; upon which *M. W.* entered into the whole of the estates: and, on an ejectment brought by *G.* on the demise of *R.*, son of *R. B.*, against *M. W.*, the question was, Whether the plaintiff was entitled to recover? And it was contended, that *R.*'s devise to the heir of *M. W.* in the event that had happened was void; for, at the expiration of the particular estate by the death of *R.* the son, living the daughter *M. W.*, nobody could take as heir of *M. W.* for *nemo est hæres viventis*. But, by *De Grey*, Chief Justice, the question is, Whether here is a sufficient description of the person to make the son of *M. W.* take as her heir living the mother. The intention of the testator is clear, that the same favour should be extended to the heirs of *M. W.* as to the heirs male of the body of *R.* He took notice that the daughter was living, by leaving her a term and a subsequent annuity, and meant a present interest should vest in her heir, that was, her heir apparent, during her life. He therefore did not think the lessor of the plaintiff was entitled to more than a moiety of the estates. *Gould*, *Blackstone*, and *Nares*, Justices, were of the same opinion. *Blackstone* thought that, as the testator had varied the tenure of *M. W.*'s annuity from that of the three other sisters, their's depending on their own single lives, and her's on the joint lives of herself and her brother *R.*, it was plain the testator had in his contemplation that *she might survive R.*, as, in fact, she did; and, therefore, the word *heir* must be construed as equivalent to *issue*, in order to make him take in her lifetime, agreeable to the intent of the testator.]

A. devised in this manner: I give to my eldest heir male, and his heirs male for ever, all my lands in such a place; and if there be a female, she to have 12*l.* per annum as long as she lives; the testator had two sons, the eldest of which died in his lifetime, leaving issue; and it was adjudged, that the lands should go to the second son, and not to the daughter of the eldest, though she was heir general.

Baker v. Wall, Pr. Ch. 468. S. C. cited by Lord Chancellor.

J. S. devised to trustees in trust, after debts and legacies paid, to convey to *A.* his cousin, and the heirs male of his body, and for want of such heirs male, then to the heirs male of the body of *B.* his great-grandfather, and for want of such heirs male, to his own right heirs for ever, and gave to his sister 2000*l.* to be put out at interest during her life, she to receive the interest, and after her death to her children, and die; and soon after *A.* died without issue, and *C.* being heir male of *B.* the testator's great grandfather,

but

Abr. Eq.
214. *Baker*
and *Hall*,
adjudged in
C. B. 1 *Ld.*
Raym. 125.
S. C. by the
name of
Chancellor.

2 *Vern.* 729.
Newcomen
and *Bark-*
ham, and
this matter
well debated.
[1 *Eq. Abr.*
dit. Devises,
215. pl. 14.
S. C. 1 r. Ch.
442. 46.

S. C. by the name of Brown v. Barkham. On a bill of review brought before Lord but not heir general, there being a daughter of an elder brother; the question was between him and the testator's sister, and the heir at law, who had the 2000 *l.* devised to her, Whether the devise was void, or not? and my Lord Chancellor held the devise good; and that C. should take as a person sufficiently described and intended by the testator.

Hardwicke, in November 1741, the decree in this case was affirmed, but according to a note of it in Hargr. Co. Lit. 27. b. his Lordship considered the case as an exception to the general rule. But the opinion of Lord Cowper has been since confirmed by a decision of the court of King's Bench on a case sent by the court of Chancery. The question arose on both a will and a deed, whether *A.* took by purchase under the description of *heir-male of the body of B.* not being heir general? *B.* being in the deed the grantor, the court certified that *A.* took an estate-tail by descent, but they added in the certificate, that if a *third person* had been the grantor, they should have thought that *A.* would have taken by purchase as heir male of the body of *B.*—And they also certified, that he did so take under the will. *Wills v. Palmer*, 5 Burr. 2615. And the same point was resolved on a marriage settlement in the case of *Evans v. Weston*, in the Exchequer, M. 1774, and H. 1775.]

[A devise is never construed absolutely void for uncertainty, but from necessity; for, if there be a possibility to reduce it to a certainty, the devise is good.]

Ungly v. Peale, 2 Ld. Raym. 1312. 10 Mod. 103. 2 Eq. Ca. Abr. 358. 8 Vin. Abr. tit. Dev. D. Ca. 19. Note, This case was first adjudged in C. P. and that judgment afterwards affirmed on writ of error in K. B.

One seised in fee of a house at *Ludgate*, devised the same “to *S.* and his brothers successively for their lives,” and then the testator, after mentioning another matter, went on and said, “And as for my house at *Ludgate*, I do not leave it to *S.* nor his brothers afore to be entered on and enjoyed till one month after their marriages.” *S.* at the time of making the will had two brothers, *R.* and *O.*; *S.* was the eldest, *R.* the second, and *O.* the third son; *R.* died in the lifetime of *S.* and *O.*; and the question was, Whether this was a good devise, or void for uncertainty? And it was argued against the devise, first, that it was void for uncertainty, by reason of the word *successively* not shewing which should take first and which second in succession: secondly, that the condition in relation to marriage made it more uncertain; for, till marriage none could take; and suppose the second brother had married, and neither of the other two, who must have taken? Certainly none of them; for, if he that was married should take first, then that would overthrow the other construction of *successive*, that the oldest ought to take first, and then the second, and then the third. *Sed per totam curiam*, the will was good and certain enough; for, being in the case of brothers, the common law was a guide to the exposition of the word *successive*, viz. that the eldest should, after his marriage, enjoy it first for his life, then the second, and then the third; and the court agreed, that the clause about marriage made no alteration in the exposition of the will, but only added a restriction to the devise, which before was general; and, therefore, that if the second son had married before the eldest, yet he could not have taken by this devise.]

4. By the Devisee's dying in the Lifetime of the Devisor.

Plow. Com. 345. Bret and Rigden, [Goodnight

If a man devises lands to *A.* and his heirs, and *A.* dies in the lifetime of the devisor, the heir of *A.* shall take nothing by the will, for the heirs of *A.* were not named as immediate takers,

but only to express the quantity of the estate that *A.* should take. v. Wright,
1 Str. 25.
and 1 P.

Wms. 397. S. P. Warner v. White, Dougl. 344. and 1 Br. Ch. Rep. 219. note, S. P. Hodgson v. Ambrose, Dougl. 336. S. P. Doe v. Kett, 4 Term Rep. 601. And the law is the same in the devise of a copyhold, Busby v. Greenslate, 1 Str. 445. Duke of Marlborough v. Lord Godolphin, 2 Vez. 77. And that a new publication of the will after the death of *A.* would not make such a devise good, see 4 Term Rep. 601. 2 Lev. 243. Sir T. Jon. 135. Sir T. Raym. 408. 1 Mod. 267. 2 Mod. 313. Pollex. 546. 1 Ventr. 341.]

If a man devises lands to *A.* his second son, and to the heirs of his body, and after his death without issue, then to *B.* his third son in tail, &c. if *A.* hath issue and dies in the lifetime of the devisor, and then the devisor dies, *B.* shall have the lands presently; for the devise to *A.* being void, it is as if it had never been made. Cro. Eliz.
422, 423.

If a man devises to *A.* and his heirs, to the use of *C.* and his heirs, and *C.* dies in the lifetime of the devisor, his heir can take nothing; but the devise will be to the use of the devisor and his heirs. Leon. 253.
Cro. Eliz.
243. Har-
top's case.

But if there be a devise to *A.* for life, remainder to *B.* in fee; though *A.* dies in the lifetime of the devisor, *B.* shall take; or if *A.* refuses, he shall take. Plow. 344.
Cro. Eliz.
423.
Co. 101. a.

If a man devises his lands to his wife for life, and after to his four daughters and heirs, equally to be divided between them, share and share alike, to hold to them and their heirs for ever; and one of the daughters dies, having issue a son, and then the devisor dies, the will is void for a fourth part. 2 Sid. 53.
78. Pack-
man and
Cole.

So, if *A.* has issue two daughters *B.* and *C.*, and he devises some tithes and money to *B.*, and gives legacies to her children; but declares that she having married without his consent, she should have no part of his real estate, and devises his real estate to *C.* in tail, remainder to *B.* for life, and to her first, &c. and *C.* dies in the lifetime of the testator, leaving issue; though afterwards *A.* makes a codicil to his will, and devises some particular legacies out of his personal estate; yet as that does not amount to a republication of his will, *B.* must have the lands immediately after the death of the devisor, though contrary to the intention of the devisor, the authorities being so. 2 Vern. 722.
Hutton and
Simpson.
[Pr. Ch. 439.
S. C. by the
name of
Sympson v.
Hornby.
Doe v.
Kett,
4 Term
Rep. 601.]

If a man devises lands to *A.* and *B.* and their heirs, and *A.* dies in the life of the devisor, *B.* shall take the whole lands. Carter, 4, 5.
Davis and
Kemp.

* What circumstances are necessary by the 32 H. 8. c. 1. and 34 and 35 H. 8. c. 5. and 29 Car. 2. c. 3., and what shall be a revocation and a new publication, vide tit. Will.*

Legacies.

In treating of Legacies, we shall consider

- (A) What a Legacy properly is.
- (B) Where a Legacy shall be said to be well given :
And herein,
 - 1. What Words make a good Bequest.
 - 2. What shall be a sufficient Description of the Person to take.
 - 3. What shall be a sufficient Description of the Thing given, and what shall be said to be bequeathed.
- (C) What shall be an Ademption or Extinguishment of a Legacy.
- (D) Where a Legacy shall be presumed to be a Satisfaction of a Debt or Duty owing from the Testator.
- (E) Of Legacies vested or lapsed : And herein,
 - 1. Where it shall be a lapsed Legacy by the Legatee's dying in the Lifetime of the Testator, and where in such Case it shall vest in another Person, to whom it is limited over.
 - 2. Where a Legacy shall be said to be vested or lapsed, being to be paid at a future Time, to which the Legatee did not arrive.
- (F) Of Conditional Legacies, and how far the Condition must be complied with, otherwise the Legacy will be forfeited.
- (G) Of Specifick and Pecuniary Legacies, and the Difference between them.
- (H) Of abating, refunding, and giving Security for that Purpose.
- (I) Of Residuary Legacies and Legatees.
- (K) Of the Payment of Legacies : And herein,

1. What shall be a good Payment, and to whom to be made.
2. At what Time a Legacy is to be paid.
3. Where the Legatee shall have Interest, and Maintenance in the mean Time.

(L) Of the Executors Assent to a Legacy.

(M) Legacies, in what Court, and how properly recoverable.

(A) What a Legacy properly is.

A (a) Legacy is defined a gift or bequest of a (b) particular thing by testament, in which an executor is (c) named, or by a writing in nature thereof, called a codicil, in which no executor is named.

Swinb. 17.
Godolph.
271. (a) The word *Devise* is spec any appropriated

to a gift of lands, the word *legacy* to a gift of chattels, though both are used promiscuously. Godolph. 271. (b) For if a man dispose or transfer his whole right or estate upon another, this, according to the civil law, is called *hereditas*, and he to whom it is transferred is termed *heres*; but by our law he only is called *heir*, who succeeds to lands and tenements. Godolph 271-2. (c) But though a writing in which a person expresses his mind to grant such and such things after his death, cannot be called a testament, unless an executor is named, yet it is of force and effect sufficient to pass what he therein declares, and administration shall be granted, with the said writing or codicil annexed, to the next of kin, and such administrator is obliged to observe the directions of such writing, and pay the legacies as far as he has assets. *Vide tit. Executors and Administrators.*

A *donatio causa mortis* is a gift in *presenti*, to take effect in *futuro* after the party's death, and is in nature of a legacy, and waits upon the death of the testator, and is ambulatory and open till his death, and may therefore be revoked, as a will may, but has no dependance on the will; and therefore by a general revocation of all former wills seems not to be revoked, without added, and all gifts, legacies, &c. But if one just before his death give any money, or other goods, to another absolutely, this is not a *donatio causa mortis*, because not revocable; otherwise, if he had said, *This shall be yours, if I die*, or any thing to that purpose.

Swinb. 22.
Prec. Chan.
269. 300.
[In considering the doctrine of donations *mortis causa*, one cannot help remarking how closely the decisions of the courts of this country

have followed the Imperial Constitutions. Bracton in treating of this subject uses the very language of the Roman law. Lib. 2. c. 26. It seems therefore not to be altogether improper, or to be digressing too far from the limits of our work, to enter into a short comparison of the Imperial and English laws upon this subject.

A donation *mortis causa* is described in the Institutes, "*Cum quis ita donat, ut si quid humanitas ei contigerit, habere it, qui accipit; sin autem supervixerit is, qui donavit, recipere; vel, si cum donationis permittisset, aut prior decesserit is, cui donatum sit.*" And in another part, "*Cum magis se quis velit habere, quam cum, cui donat, magisque cum, cui donat, quam heredem suum.*" So with us, a donation of this kind must have relation to the death of the donor, is perfected by his death, and until his death is merely conditional, liable to be defeated by the death of the donee in the lifetime of the donor, by the revocation of the donor; and as Bracton states it, by the donor's recovery, or escape from the danger he apprehended himself to be in, and see sec. Lawson v. Lawson, 1 P. Wms. 441. but see Hill v. Chapman, 2 Br. Ch. Rep. 612. *simb. contr.* And as with us, if it be not made with reference to death, if it be to take effect presently, if it be revocable, it is then, not a donation *mortis causa*, but a donation *inter vivos*, and therefore cannot have place between husband and wife; (and a proper donation *mortis causa* may, like a legacy, pass between persons in that relation.) Tate v. Hilbert, 2 Vez. jun. 111. 4 Br. Ch. Rep. 286. S. C. Lawson v. Lawson, 1 P.

Wms.

Wms. 441. *Miller v. Miller*, 3 P. Wms. 356; so, by the Imperial law, "*Ubi ita donatur mortis causa, ut nullo casu revocetur*, [mors] (which must be supplied) *causa donandi magis est, quam mortis causa donatio; et ideo perinde haberi debet, atque alia quævis inter vivos donatio; ideoque inter viros et uxores non valet*." D. L. 3. tit. 6. l. 27. — By both laws a donation of this kind may be made by a person in *periculo mortis* not only from sickness, but from whatsoever other cause. D. L. 39. tit. 6. l. 3, 4, 5, 6. Bract. Lib. 2. c. 26. And as by the English law, it is subject to the debts of the donor, and fraudulent as against creditors, *Drury v. Smith*, 1 P. Wms. 406. so by the Imperial law, "*Sicuti legata non debentur, nisi deducto ære alieno, aliquid supersit; nec mortis causa donationes debentur; sed infirmatur per æs alienum. Quare, si immodicum æs alienum interveniat, ex re mortis causa fieri donata nihil aliquis consequitur*." D. L. 35. tit. 2. l. 66. § 1. *Et si debitor consilium creditorum fraudandorum non habuisse, avellit res mortis causa ab eo donata debet. Nam cum legata ex testamento ejus qui solvendo non fuit, omnimodo nulla sunt; possunt videri etiam donationes mortis causa factæ rescindi debere, quia legatorum instar obviunt.*" D. L. 39. tit. 6. l. 17. — Whether, by the Imperial law, a delivery either actual or symbolical of the subject of the donation were absolutely necessary, no where distinctly appears, and hath indeed been a matter of controversy among civilians. Whether, by our law, an actual delivery *be in all cases* requisite, hath not yet been adjudged; in general, it certainly is so. *Ahton v. Dawson*, Sel. Ca. in Can. 14. *Drury v. Smith*, 1 P. Wms. 404. *Hedges v. Hedges*, Pr. Ch. 269. *Ward v. Turner*, 2 Vez. 441. And a mere symbolical delivery will clearly be of no effect; unless indeed the symbol be such as enables the party to come at the possession of the thing which it represents, such as the key of a trunk which contains the thing given. *Jones v. Selby*, Pr. Ch. 300. 2 Vez. 443. Hence it hath been determined, that the delivery of a promissory note, not payable to bearer, *Miller v. Miller*, 3 P. Wms. 357. and of receipts for S. S. annuities, *Ward v. Turner*, 2 Vez. 439. is not a sufficient delivery to effectuate a gift of this kind of the money due on the note or of the annuities, the property neither in the note nor in the stock, passing thereby; and yet the delivery of a bond, though a *chose in action*, hath been held to amount to a gift (*mortis causa*) of the debt itself. *Snellgrave v. Bailey*, 3 Atk. 214. But see 3 P. Wms. *ubi supra*. — That a donation *mortis causa* was good without delivery, where it was evidenced by writing, was admitted by the Imperial law. — *Quidam* (which must be supplied) *avunculo suo debitori mortis causa donaturus quæ debebat, ita scripsit. TABULÆ, VEL CHIROGRAPHATA TOT, UBICUNQUE SUNT, INANES ESSE; neque eum solvere debere. Quæro, an hæredes, si pecuniam ab avunculo defuncti petant, exceptione doli mali tueri se possint? Marcellus respondit, posse: nimirum enim contra voluntatem defuncti hæres petit ab eo.* D. L. 35. tit. 6. l. 28. And with us in a late case, Lord Chancellor Loughborough, in speaking on this subject is reported to have said, "It is not necessary in this case to discuss, whether delivery is necessary in all cases. Perhaps, it might not be difficult to conceive that such a gift might be by deed or by writing. It is clear it could not be by mere parol; because saying '*I give*,' without an act, does not transfer the property. So far I concur with the reasoning of Lord Hardwicke, in *Ward v. Turner*. It might be considered, if the case should arise, whether there would be any objection to a formal deed. I should think it not within the jurisdiction of the ecclesiastical court, and that the property to given is not to be possessed by the executor." *Tate v. Hilbert*, 2 Vez. jun. 120. And an instance of such a gift by deed occurs in the case of *Johnson v. Smith*, 1 Vez. 314. — Indeed a devise of lands seems to be nothing else but a conveyance or disposition *mortis causa*. 1 Burr. 429. — A delivery to a third person to hold in trust for the donee, to be given to him in the event of the donor's death, was allowed to be sufficient by the Imperial law, D. L. 39. tit. 6. l. 8. § 2.; but it may be doubted, whether it would be so by our law, by reason of the maxim, *donatio persequitur possessionem accipientis*, *Jenk. 109. ca. 9.* whence gifts with us have the semblance of contracts. — To effectuate gifts of this kind the Emperor Justinian required the testimony of five witnesses, Cod. Lib. 8. tit. 57. l. 4. a caution which hath been thought reasonable, and in some degree followed by our own courts, *Ward v. Turner*, 2 Vez. 438.; though it must be admitted, that such a gift has been supported upon the testimony of only one witness. *Hill v. Chapman*, 2 Br. Ch. Rep. 612. — By the Roman law, every thing was capable of being the subject of a donation *mortis causa*; but by our law the necessity of delivery excludes all those things, the property wherein does not or cannot pass by delivery, 3 P. Wms. 357. 2 Vez. 436-7.; though, if, according to the inclination of Lord Loughborough's opinion, *supra*, such a donation may be effectual by deed or writing without livery, it seems to follow, that even those things which are of too complex a nature to pass by delivery, such as the whole, or residue of personal estate, may be so disposed of.]

Cro. Jac.

345-6.

2 Bulf. 207.

Godb. 246.

but vide

now the

statute

29 Car. 2. c. 3.

and tit.

Wills and Testaments.

If one by his will in writing devise a certain legacy in money, and afterwards say to his executor, *I have by my will given such particular legacies, I would have you increase the same to such a sum*, this by the civil law is termed *commissum fidei*, and a good legacy.

2 Leon. 119.

If a man covenants with J. S. to pay him 20*l.*, and afterwards by will he devises to him 20*l.* in discharge of the said covenant, this is not a legacy suable in the spiritual court, but remains still a debt, recoverable at common law.

But

But if *A.* covenants with *J. S.* that he will pay 20*l.* a-piece to *B.*, *C.*, and *D.*, and afterwards he devises 20*l.* a-piece to *B.*, *C.*, and *D.*, in discharge of this covenant, these are good legacies, and recoverable in the spiritual court, the covenant in this case being with a stranger, and therefore *B.*, *C.*, and *D.* have no remedy, but by applying as legatees.

2 Leon. 119.
Davies and
Percie's
case; &
vide infra,
letter (M).

(B) Where a Legacy shall be said to be well given : And herein,

1. What Words create a good Bequest.

HERE we must observe, that although in grants and deeds of gift the law requires a set form of words, yet in last wills and testaments, which are presumed to be made at the time when the testator is *inops concilii*, the law regards chiefly the intention of the testator, and therefore any words, which manifest his intention to create or give a legacy, will be sufficient for that purpose.

Godolph.
281.
2 Vern. 467.

As, if a man by his will says, *I do give, bequeath, devise, order or appoint to be paid, given, or delivered; or, My will, pleasure, or desire is (a), that he shall have and receive, or keep or retain; or, I dispose, or assign, or leave such a thing to such a one; or, Let such a person have such a thing;* these, or the like words, are sufficient to create a good bequest.

Godolph.
281.
[(a) If a
testator de-
sire his ex-
ecutor to
give another
200*l.* with-

out prescribing any time of payment, it is a good bequest. *Brest v. Offley*, 1 Ch. Rep. 246. For where the property and the person are ascertained, *recommendatory* bequests are considered as *imperative*. *Harding v. Glyn*, 1 Atk. 469. *Richardson v. Chapman*, 1 Burn's E. L. tit. Bishops, p. 220. 5 Br. P. C. 400. *Earl of Bute v. Stuart*, 5 Br. P. C. 534. *Palmer v. Scribb*, 2 Eq. Ca. Abr. 291. *Harland v. Trigg*, 1 Br. Ch. Rep. 142. *Wynne v. Hawkins*, *Id.* 179. *Nowlan v. Nelligan*, *Id.* 489. *Pierston v. Garnet*, 2 Br. Ch. Rep. 45. 230. *Malim v. Keighley*, 2 Vez. jun. 333. 529.]

So, if the testator says, *I depute such a thing to A. B.*, or, *I assign such a thing to C. D.*; these are good bequests or legacies.

Godolph.
282. Where
it is said,

that a legacy may be given by signs, hecks, or nods, by the head, hands, or eyes, or by shewing a pleased or displeased countenance, or by other motion of the body; because the law regards more the meaning and intention, than the words of the testator. Godolph. 282-3.

So, if a man by will gives 100*l.* besides the cloak, &c.; this is a good bequest of the cloak, &c. as well as of the 100*l.*

Godolph.
282.

So, if a man says, *Out of the 100*l.* which I bequeathed A. I give B. 50*l.**; this a good bequest of the 50*l.* to *B.*, because only a false demonstration in an immaterial circumstance, which shall not vitiate the legacy; but in this case *A.* takes nothing; for words of diminution shall never be construed to give a legacy by implication.

Godolph.
282.

But if the demonstration be totally false, as if the testator says, *I bequeath to A. the 100*l.* which I have in my chest*, and there is not any money in the chest, the legacy is void.

Godolph.
282.

If the testator says thus, *If my son A. marries B., let not my executor give him 100*l.**; these words, on *A.*'s not marrying *B.*, are said to be sufficient to give him the 100*l.*

Godolph.
283.

Godolph.
284.

If a legacy be given by the testator to the son of one who is indebted to him, and the testator add these words, *I should or would leave him more, if his father had paid me what he owes me*, it is held, that if afterwards that son happens to be his father's executor, he is by these words freed from that debt, which his father owed the testator.

2 Vern. 467.

If there be a devise of a personal thing to *A.* for life, directing him at his death to give it to *B.*; this amounts to a devise of the use of it only to *A.* for life, remainder to *B.*

Nowlan v.
Nelligan,
1 Br. Ch.
Rep. 482.

[A testator made a testamentary paper in the following words :

" I give and devise unto my loving wife *H. N.* all my real and personal estate ; I make no provision expressly for my dear daughter (the plaintiff), knowing that it is my dear wife's happiness, as well as mine, to see her comfortably provided for ; " but in case of death happening to my said wife, in that case, I " hereby request my friends *S.* and *H.* to take care of, and manage to the best advantage, for my lovely daughter *H. N.*, all " and whatsoever I may die possessed of." The executors proved this testamentary paper, and got in the personal estate of the testator, to the amount of 7,947*l.* 10*s.*, with which they purchased 11,000*l.* 4 *per cent.* annuities. On a bill filed by the daughter, praying, that the whole of these annuities might be transferred, and secured to the use of the plaintiff, subject to the life-estate of her mother, and be declared to belong, subject to such life-interest, to the plaintiff, Lord *Thurlow* directed the whole fund to be transferred to the Accountant-general, the whole annual produce to be paid to the defendants (the mother and her second husband) so long as they should continue to maintain the plaintiff, with liberty to her to apply, if they should discontinue such maintenance.]

2 Vern. 181.
Robinson v.
Dufgale ;
& vide
Hob. 9.

A. devises his land to *B.* in fee, paying 400*l.* whereof 200*l.* to be at the disposal of his wife, in and by her last will and testament, to whom she shall think fit to give the same ; these words vest an absolute interest in the wife, so that though she dies intestate, her administrator shall have the 200*l.*

2 Vern. 513.
Thomas and
Thomas.

(a) But if
an executor
has a general
power to
distribute a
sum of money
amongst

If a man gives legacies to his children, to be paid at twenty-one or marriage, and if any of them die before twenty-one or marriage, the legacy of such child to be disposed of to two or more of the children then living, in such manner as his wife (whom he makes executrix) shall think fit, and one of the children dies under age, and unmarried, the mother (a) may appoint such legacy to any one of the other children, and it will be good.

children at discretion, and he makes an unreasonable or indiscreet disposition, it will be controlled in a court of equity. 2 Vern. 513. — As, where a man having two daughters, one by a former wife, and another by a second wife, devised his estate to his wife, to be distributed between his daughters as his wife should think fit, and she having given 1000*l.* to her own daughter, and but 100*l.* to the other, the court decreed an equal distribution. Vern. 355. Cragrave and Perrott ; & vide 2 Vern. 421. S. P. [Alexander v. Alexander, 2 Vez. 640. Menzey v. Walker, Ca. temp. Talb. 72. S. P.]

2 Chan. Ca.
198. Martin
and
Clerk.

If a man devise 40*l.* to be paid *J. S.*, by him to be disposed of in such manner as the testator should, by a private note, acquaint him

him with, and die without such appointment, this is said to be a good bequest to the party.

But it has been held, if *A.* by will gives a house at *F.* to *B.* his wife for life, and declares that he will dispose of the goods and furniture in that house, after the death of *B.*, by a codicil, and makes *B.* residuary legatee of all the *residue of his personal estate whatsoever not before disposed of, or reserved to be disposed of by his codicil*, then makes two codicils, but takes no notice of the goods and furniture in the house at *F.*, and makes his wife one of his executors, that the wife should not have the absolute interest in the goods and furniture in the house at *F.*, but that it should be distributed after her death as an undisposed interest, and she to have her widow's part thereof only.

If one devise his land for payment of his debts and legacies, and devise 400*l.* a-piece to two of his sisters, and to his third as much as his executor shall think fit; the third shall have 400*l.* also, and be made equal to her other sisters, if the estate will hold out.

3 P. Wms.
40. Trin.
1730.
Davies and
Dewes & al.
decreed.

2 Vern. 153.
Wareham
and Brown.

2. What shall be a sufficient Description of the Person to take.

It seems agreed, that if a man devises legacies to all his children and grandchildren, that this extends only to those who were *in esse* at the time when the will was made, for then the will speaks, and none born after are to be let in, unless there had been future words in the will, *to all his children or grandchildren which should be born or be living at his death.*

But in 2 Vern. 105. where a man devised 20*l.* a-piece to all the children of his sister; it is there said to have been decreed, that a child born after the will, and before the death of the testator, should take, the word *children* comprehending all.

[A residue of personal estate was bequeathed to the testator's brother *H.* and *all* his children, to be divided amongst them, share and share alike: *H.* had several children; the testator dies; and six months afterwards another child is born. Lord *Talbot* held, that this child could not take.

A testator bequeathed 2000*l.* to all the children of his nephew *J. H.*, who should be living at the death of *A.*; and afterwards bequeathed the moiety of the residue of the personal estate to all the children of *J. H.*, payable at 21 or marriage. The question was, Whether children born after the death of the testator could take? And the court were of opinion that as to the 2000*l.* they should, if born before the death of *A.*, upon the particular words of the will; but as to the residue, those only who were living at the death of the testator could take.

A testatrix devised lands to trustees in trust to sell for payment of her debts, and gave all the residue arising by such sale, and all her personal estate among all the children respectively, male or female, of her brother and sister *H.* They had only four children at the time of making the will, and after the death of the testatrix, another was born. Lord *C. B. Parker*, sitting for Lord Chancellor, held, that this after-born child was not entitled to any share under the will.

Dyer, 177.
Co. Lit.
112. b.
Preced.
Chan. 470.
1 P. Wms.
340.
2 Vez. 84.

Webb v.
Webb, Hil.
1735, cited
in 1 Vez.
112.

Hale v. Hale,
6 Geo. 2.
cited *ibid.*

Heath v.
Heath,
2 Atk. 128

Coleman v.
Seymour,
1 Vez. 209.

A testator gave a legacy of 3000*l.* to his daughter *J.* wife of *C.* for the use of her younger children, to be by her distributed among them in such manner, shares, and proportions, as she should think fit; and if no appointment should be made by her, then equally to be divided between her younger children, and to survive, if any of the children died under age or unmarried. The question was, Whether the legacy should be for those younger children only, whom the testator's daughter had at that time by that husband; or, whether the younger children by any future husband should also take? By Lord *Hardwicke*, As to any children that may be born of a second marriage, they could not be intended: for the daughter having four children by *C.* at the making of the will, if after his death she married a second husband, having a great estate settled on the eldest son of that marriage, that son within the description of a younger child would be contrary to the intent. But the words could not take in the children born subsequent to the making or death of the testator, being a present legacy. It might be different had he given it to her for life, and afterwards to her younger children; because then it would be contingent, and a devise over: but here it is present; and the same as if he had said, equally to be divided, unless she appoints; being a vested interest and immediate gift to them, subject to the power of variation given to the mother. Nor does the clause of survivorship make any difference, being still vested. This legacy then, both in the intent and words, is present to them, and not to be extended to those born after his death; and it can only mean children living at the making of the will; or, at farthest, at the death of the testator.

Horsley v.
Chaloner,
2 Vez. 83.

W. H. bequeathed 200*l.* to the younger child of his son *W.*, or, if more than one, then to such younger children, equally to be divided, and to be paid at their respective ages of 21, and if any die before 21, then to survive to the others; and for want of such younger child or children, or their not attaining 21, then the 200*l.* to go to the eldest child of his son *W.*, to be paid at 21. Two of the daughters were born in the life of their grandfather, and both came of age; and the question was, Whether a daughter born after the testator's death should be let in for a third equally with them? And the Master of the Rolls held, that she should not, for that in this case, the provision was expressly appointed to be paid at 21, and therefore it must be construed to be vested in those living at the death of the testator, and cannot go farther.

Isaac v.
Isaac,
Ambl. 348.

A testator, after several legacies, gave to the children of his niece *A. I.* the remainder and residue of his estate, which he directed to be paid into a bank or stock, and the interest to be paid yearly for such learning as that sum would defray, and at the age of 20 years to be divided equally between them, and if she had only one child, it should have the whole; but if his niece had no children, the interest was to be paid to her or her husband during the term of seven years, and then the whole sum was to be delivered to her or her husband, *A. I.* had four children living
at

at the death of the testator, and after his death, had a fifth child born. Lord *Camden* was clear of opinion, that the interest vested at the death of the testator, being given *per verba de presenti*; and that the after-born child was excluded.

A testator devised all his goods and chattels to *J. C.* and *J. H.* to be sold to pay his debts, and the overplus (if any) to be employed to the best use of their children begotten by the testator's daughters *M. C.* and *E. H.* equally to be divided between them. The Chancellor held, that the division was to take place at the testator's death, and therefore that all children born in the lifetime of the testator took, but not those born after his death.

Roberts v. Higman,
1 Br. Ch.
Rep. 532.
note.

E. P. gave her real estates to trustees for 500 years, upon trust, for raising 200*l.* for better securing her debts and other purposes, with remainder to trustees for 1000 years, in trust, to repay the 200*l.* and raise annuities, and subject to the terms she gave the estate to *all and every the child and children of her brother T. G.* and the heirs of the body and bodies of such child or children, as tenants in common, if more than one, in equal proportions; and in case of failure of issue of the bodies of such child or children whose issue should so fail, to every the remaining child or children of the said *T. G.* and to the heirs of the body and bodies of all and every such child and children, if more than one, to take as tenants in common; and if there should be a failure of issue of all such children, or if there should be but one such child, then to such remaining or only child; in default of such issue, to her brother *T. G.* for life, with remainders over. And she directed the remainder of her personal estate to be placed at interest, and subject to annuities, she gave it to all and every the child and children of her brother *T. G.* who should live to attain 21, such children, if more than one, to take equally, if only one, then such only child; and if there should be no such children, or none who should attain 21, then she desired her personal estate, and the rents and profits of her real estate, to be distributed amongst her next of kin. *T. G.* had two children, *R.* and *E.*, born before the death of the testatrix, and three children, *S.*, *T.*, and *E.*, born after her death. A bill was brought by the daughter of *S.*, one of the after-born children, who died before 21, claiming the benefit of her mother's supposed share of the real estate of the testatrix, as heir of the body of her mother. Lord *Thurlow* was of opinion, that there was no point of time in this case to which the words, *all and every the child and children of T. G.* could be confined, except the death of the testatrix, and therefore determined, that the plaintiff's mother *S.*, who was born after the death of the testatrix, could have no share.

Singleton v. Singleton,
1 Br. Ch.
Rep. 542.
note.

G. L. bequeathed to his wife *M. L.* the residue of his real and personal estate for life; and after her death, he gave the same to the children of Mr. *John Ayton* and his wife *Jane*, to be equally divided between them the said *Jane Ayton's* children, and not any children of any other marriage by either party. At the death of the testator and his widow, *J. A.*, *S. A.*, and *M. A.* (since dead) were the only children of *John and Jane Ayton*, then born; but

Ayton v. Ayton,
ibid.

they

they had afterwards three other children: Sir *L. Kenyon* declared, that the interest in the residue of the testator's personal estate vested absolutely in the three children of *John* and *Jane Ayton*, who came into *esse* during the life of *M. L.*, and that those born after were not entitled to a share.

Hughes v.
Hughes,
3 Br. Ch.
Rep. 352.

A testator disposed of a residue upon trust to apply the rents and profits of his houses in, &c. and the dividends of his money in the publick funds, and all other his personal estate for the maintenance and education of all the children of his three daughters, until the youngest of such children should attain 21; and in case of the death of any of them before the youngest should attain 21, who should have been married, and should have at his or her decease a child or children, he directed, that such child or children should be entitled to the same share which their deceased parents would have received in case they had respectively lived till the youngest of such child or children should have attained 21; and when such youngest child should have attained 21, then testator gave one full and proportionable share of the capital thereof, to the proper use of such his said grandchildren as should be then living, and the child or children of such as should be dead. The question was, Whether the plaintiffs, who were the children of testator's three daughters born at the time of his decease, were to take exclusively of the defendants, who were born after his death? Lord *Thurloawe* held, that the gift was confined to the death of the testator.

Viner v.
Francis,
2 Br. Ch.
Rep. 653.

A testator gave a legacy to the children of his *late sister M. C.* At the date of the will, there were three children of *M. C.* living, but one of them afterwards died in the lifetime of the testator. It was contended, that one-third of the legacy given to the children of *M. C.* lapsed into the residue. But the Master of the Rolls, Sir *R. P. Arden*, was of opinion, that by the words children of *M. C.* were meant such persons as should be children at the death of the testator, though *M. C.* was dead at the date of the will, and decreed accordingly.

Haughton
v. Harrison,
4 Atk. 329.

T. H. gave a legacy of 500*l.* to be paid to his grandson *T. P.*, the son of *M. P.*, if he lived to be 21, and in case he should die before, then to the other child or children of his daughter, equally, arriving at such age. *T. P.* the grandson died under the age of 21 years, and there being no child or children of *M. P.* living at the testator's death, it was insisted, that the 500*l.* ought not to be raised for after-born children, but sunk into the *residuum* of the testator's estate for the benefit of the residuary legatee. But by Lord *Hardwicke*—It is plain the grandchildren born after the testator's death are entitled, for as they were not *in esse* in his lifetime, the testator must have had in his view future children of his daughter.

Maddison
v. Andrew,
1 Vez. 57.

A testator gave a legacy of 300*l.* to the children of his sister *S.* to be paid by his executor, and equally divided, share and share alike, at their respective ages of 21 or marriage, with interest at 4 *per cent.*, and failing the share of any, to the survivors; and failing the share of all, to his sister *G.* The question was, In whom

whom this legacy should vest, whether in the only child of *S.* alive at the making of the will, or also in those since born or to be born? Lord *Hardwicke* thought it was meant for the benefit of all the children *S.* should have; for the testator knowing she had but one then, has yet given it to children, and has pointed out survivors; and gives it over to another branch of the family; which he could not mean, till all failed.

A woman devised to the son and two daughters of her nephew *F. E.* 10 *l.* a-piece by name; then gives 300 *l.* to *E. P.* to be paid at her age of 21, or marriage; and interest in the mean time for her maintenance and education; but if she died before 21 or marriage, then to the younger children of her nephew *F. E.*, equally to be divided between them. Some of the younger children were born before, some after the making of the will, and some after the death of the testatrix. Lord *Hardwicke* thought, that the testatrix meant that the legacy should be divided when it vested, and therefore should go to such as should be younger children at the death of *E. P.* before 21 or marriage.

W. A. devised his real estate to trustees and their heirs to the use of *H.* his daughter, for life, with remainder to the heirs of her body; and after her decease without issue, in trust to sell, and to divide the money equally between all and every the children of his sister *E.* the wife of *B.*, and of his sister *M.* the wife of *J.*, at their respective ages of 21. The sisters had each of them several children born in the lifetime of the testator; and *E.* had a daughter born about eleven months after the testator's death, but in the lifetime of *H.* his daughter, who afterwards died without issue. The question was, Whether such after-born daughter was entitled to a share of the money? And Sir *Tho. Clarke*, Master of the Rolls, seemed very clearly of opinion, that she was entitled. He observed, that all cases of this kind depend upon their own peculiar circumstances; that this is the case of a trust, where the court will be more liberal in making a construction, than in the case of a legal estate: that as the children are not named, there does not appear to be any predilection: that the testator describes his sisters as being then wives: that the words used are as general as possible, *viz.* all and every the children: and that this is to be considered as a devise of money, and nothing could vest at the testator's death, but it is a disposition of a remote interest, after the death of *H.* without issue.

A testator devised the residue of all his real and personal estate to trustees for the use of the heirs male of *J. A.*; in default of such issue, to the use of the heirs male of *R. A.*; and in default of such issue male, to the use of all and every the grandchildren of *J. A.* and *S. M.* as tenants in common. By a codicil of the same date with the will, he directed the trustees to pay the interest and produce of his real and personal estate to his wife *S. A.* and to the said *J. A.* and *S. M.* during their lives, with survivorship. Eight grandchildren were alive at the date of the will: a ninth was born before the testator died: twelve more were born after his decease; and all in the lifetime of *R. A.*, who died without issue.

Ellison v.
Airey,
1 *Vez.* 111.

Bartlett v.
Hollister,
Ambl. 334.
1 *Br. Ch.*
Rep. 530.
note, *S. C.*

Baldwin v.
Karver,
Cowp. 309.

issue. It was holden, that as the twenty-one grandchildren were all alive at the death of *R. A.*, all were equally entitled.

Attorney-
General v.
Crispin,
Ambl. 386.

A testatrix, having given by her will several annuities, gave, after the decease of the annuitants, 50*l.* each, to the children of *D. R.*—*D. R.* had then seven children, and he had also a daughter born after the death of the testatrix, but in the lifetime of the surviving annuitant. Lord *Thurlowe* decreed, that this after-born child must be let in to take.

Congreve v.
Congreve,
1 Br. Ch.
Rep. 530.
N. B. Lord
Thurlowe
says, that
this case
seems a very
strange de-
termination;
because
when the
first child
attained
twenty-one,
the division
must be
made. 3 Br.
Ch. Rep.
355.

A. N. devised her real estate to trustees, upon trust to permit her nephew *T. C.* to receive the rents for his life, and after his death to sell the estate, and divide the money among all and every the child and children of *T. C.* at the age of 21. She also gave her personal estate to the same trustees, in trust to divide the same between all the children of her said nephew at the age of 21; she directed her nephew to maintain the children out of the rents and profits, and gave the trustees power to apply any part of the interest of the personal estate for the maintenance of the children. The question being, Whether a child born after the death of the testatrix was entitled to a share of her estate? Sir *T. Seavell* held that she was: he said that this is the case of a trust; that there is nothing to confine it to children born in the lifetime of the testatrix, and the interest is a future one. Here is no direction what is to become of the interest of the personal estate; but there is a direction to apply any part for maintenance. This is a strong addition to the case of *Bartlett v. Hollister* (*supra*); the personal is immediately the property of the children, though not immediately given to them; if it were a power to apply, the interest would be unnecessary. The children are to have the interest with the principal, except what is applied under the power.

Devisme
v. Mello,
1 Br. Ch.
Rep. 537.

S. D. gave 5000*l.* to purchase stock, the interest to *M.* for life, then to the testator's brother *W. D.*, at his decease, to the testator's godson *S.*; and at his decease, if before he is of age, to be divided among his brothers equally. *S.* the testator's godson died in the lifetime of his father *W. D.* and in the lifetime of the testator, leaving at the time of his death two brothers, who were the two only sons of *W. D.* at the date of the will, and at the time, of the testator; but he had another son *A. D.* born some time afterwards. Lord *Thurlowe* was of opinion, that he was obliged to say the words in the bequest of 5000*l.* to the brothers of *S.* were not confined to those who were his brothers at the time of making the will: that the testator must have had in contemplation other sons coming into being; that his intention appeared to be to make an aggregate description of a part of the family of *W.* by the name of brothers of *S.* as if he had used the words male children of *W.*; that he made use of the word *brothers* merely by relation to the antecedent, the name of *S.* used in the former part of the bequest, and that he could not otherwise have described the sons of *W.* but by a circumlocution. He therefore declared that *A.*, being born before the time of the distribution of the fund, was entitled to a share of the 5000*l.*

A testator

A testator gave to the children of his sister J. G. wife of T. G. 350*l.* with interest for the same, to be paid them respectively in equal shares and proportions as they should respectively attain 21; and in case any of them should die under 21, then their share should go to the survivors and survivor. At the death of the testator, J. G. had two children, the plaintiffs; she had afterwards another child: the plaintiffs were both infants; and the court was of opinion, that the youngest child, being born during the infancy of the other two, though after the death of the testator, might be entitled to a share.]

Gilmore v. Severn,
1 Br. Ch.
Rep. 582.

If a man devise the surplus of his estate to his grandchildren living at his death, grandchildren born after his decease shall not take it; for if he had so intended it, he would not have restrained it to children living at his death.

2 Vern. 710.
Musgrave
v. Parry.

[A testator left 20,000*l.* to his executors, in trust to dispose thereof in such proportions, &c. as they should think fit, amongst such of the testator's relations as should not be worth 2000*l.*, and should apply within two years after his (the testator's) death. A claim was made on behalf of a child born after the death of the testator, who was of consanguinity; but such child, though *in ventre sa mere* at the testator's death, was holden not to be within the description.

Bennett v.
Honywood,
Ambl. 708.

So, it was determined by Sir L. Kenyon, when Master of the Rolls, that a child, *in ventre sa mere*, should not take under a bequest to the children of A. living at the death of the testator. But in a subsequent case of a similar devise, Lord Thurlow said, that though he admitted the child not to be within the strict meaning of the words; yet, the solid ground of construction is to consider whether such a child is not within the intention of the testator to provide for all the children of A.? His lordship added, he would talk to his Honour on the subject, and if he persisted in his opinion, the question must go to law. It is to be presumed that his Honour did persist in his opinion, for the question did go to law, and the court of Common Pleas determined in favour of the posthumous child.

Cooper v.
Forbes,
2 Br. Ch.
Rep. 63.
Clarke v.
Blake,
Id. 320.

2 H. Bl.
399. and
2 Vez. jun.
673.

One devised the surplus of his estate to his children and grandchildren. It was holden, that a grandchild *in ventre sa mere* at the testator's death should not take; but it was at the same time said, that if a devise were to my children and grandchildren living at my death, a child *in ventre sa mere* might, in such case, be so far regarded as to be looked upon as living.

Northey v.
Strange,
1 P. Wms.
341. That
a posthu-
mous child
is within a
provision in

a settlement for such children of the marriage as should be living at the death of the father; see Miller v. Turner, 1 Vez. 85. Beale v. Beale, 1 P. Wms. 244.

So, where one devised his estate, *in case he should leave no son at the time of his death*, to F. H., and died leaving his wife *privement enfiént* with a son; this posthumous son was adjudged to be a son living at the death of F. H., and therefore the devise to F. H. did not take place.]

Burdet v.
Hopegood,
1 P. Wms.
486.

If one devise the surplus of his personal estate to the children of A. and B., and neither of them have a child at the time of making the will, or the death of the testator, the devise is executory, and shall

2 Vern. 405.
Weld and
Bradbury.

(2) See *acc.* shall extend to any children that *A.* and *B.* shall afterwards have; and the children of each shall take *per capita*, and not *per stirpes* (*a*), they claiming in their own right, and not as representing their parents.

Blackler v. Webb, 2 P. Wms. 383. [A testator bequeathed the surplus of his personal estate equally to his son *James* and to his son *Peter's* children, to his daughter *Traverse* and to his daughter *Webb's* children, and his daughter *Man*. At the making of the will the testator's son *Peter* was dead, leaving several children, the testator's daughter *Webb* was living, but her husband was in low circumstances, and had been twice a bankrupt, and therefore the testator by his will made some provision for her separate use. The question was, How these children and grandchildren should take, whether *per stirpes* or *per capita*? Lord *King* at first seemed inclinable that the grandchildren should take *per stirpes* only; yet at length he decreed, that the testator's son *James*, and the children of the testator's deceased son *Peter* and his daughter *Traverse*, and the children of his daughter *Webb*, and his daughter *Man*, (being in all fourteen in number,) should each of them take *per capita*, as if all the grandchildren had been named by their respective names; and that the grandchildren could not take according to the statute, or in allusion thereto, forasmuch as the testator's daughter *Webb* was living, and so her children could not represent her; and to determine that the grandchildren should take *per stirpes* would be to go too much out of the will, and contrary to the words, when the meaning of the testator might be according to the words, and that meaning a reasonable and sensible one.]

Thomas v. Hole, Ca. temp. Talb. 251. The word *equally* applied to the next of kin, and relations under the statute of

distributions, causes a division *per capita*, *Phillips v. Garth*, 3 Br. Ch. Rep. 64. *Butler v. Stratton*, *Id.* 367. for though the statute furnishes the rule as to the objects of the bequest, yet it does not determine in what proportions those objects shall take; that must depend upon the directions of the testator. *Green v. Howard*, 1 Br. Ch. Rep. 31. *Rayner v. Mowbray*, 3 Br. Ch. Rep. 234.

2 Vern. 106. If *A.* devise 1500 *l.* in trust for the children of *B.*, and *B.* have only one child, and several grandchildren, the child only shall take, and the grandchildren shall not come in for shares; but if *B.* had not a child living, the grandchildren might have taken by the name of children.

2 Vern. 431. If a legacy of 500 *l.* is given to the eldest son of *A.* to be begotten, to place him out apprentice, and *A.* has a son born after the testator's death, the legacy shall be paid him though not born in the testator's life, and though it was given to him for a particular purpose.

3 Chan. Rep. 1. If money is devised to younger children, where there are divers daughters, and a son, who by birth is a younger child, but is heir at law

law to a considerable estate of inheritance, he shall not be considered as a younger child, so as to take by the devise (a).
 an eldest daughter, where there has been a son, or where the estate by a settlement goes all to a remainder-man, has, in equity, been deemed a younger child. *Beale v. Beale*, 1 P. Wms. 244. And even an eldest son *unprovided for* has been considered as a younger child. *Duke v. Doidge*, 2 Vez. 203. note. For the court will indulge this latitude of construction in cases of portions, for the sake of providing for all branches of the family. *Chadwick v. Doleman*, 2 Vern. 525. *Heneage v. Hunlocke*, 2 Atk. 456. *Lord Teynham v. Webb*, 2 Vez. 198. But the same construction is not applicable in other cases. *Lord Teynham v. Webb*, *ubi supra*. *Hall v. Hewer*, Amb. 203.]

Bretton.
 [(a) So, on the contrary,
 Vern. 35.
 Danvers v.
 Earl of
 Clarendon.

A man by will devised all his goods in such a house to G. for life, and after his decease to the heir of J. S., and the point was, whether he that was heir of J. S. should take these goods as devisee, and the said goods to go to his executors, although such heir die in the lifetime of G., or whether he who was heir to J. S. at the time of G.'s death should have them; and though it was urged that those goods were only the furniture of the capital house, yet my Lord Chancellor was of opinion, that they absolutely vest in him that was heir of J. S. at the time of the death of J. S., and decreed accordingly.

The Duke of Bolton, by will, devised in these words, *viz.* Item, *I give and bequeath unto such of my servants, as shall be living with me at the time of my death, one year's wages; per* Lord Keeper, stewards of courts, and such as are not obliged to spend their whole time with their master, but may also serve any other master, are not servants within the intention of the will; but I will not narrow it to such servants only as lived in the testator's house, or had diet from him. 2 Vern. 546.

[A testatrix gave and bequeathed unto the two servants that should live with her at the time of her death 100 l. new S. S. stock, to be equally divided between them. In fact, the testatrix had but two at the time of making the will; and afterwards took another, who lived with her at the time of her death. Adjudged, that this third servant was entitled to an equal share with the other two.]

Sleech v.
 Thornton,
 2 Vez. 560.

So, where the testator gave to the three children of his sister 50 l. each; the sister had four children, and they were all let in.

Tomkins v.
 Tomkins,
 (cited)
 2 Vez. 564.

A testatrix gave the residue of 3 per cent. annuities in trust to pay the same unto and between the two daughters of T. S., in equal shares and proportions during their lives, and if either of them should die, then to pay the whole to the survivor during life; and in case both should depart this life, then the whole was to fall into the residue. The Master of the Rolls, Sir L. Kenyon, yielding to the authority of the cases, but not the reasoning of them, felt himself compelled to declare, that all the daughters should take.]

Stebbing v.
 Walker,
 2 Br. Ch.
 Rep. 85.

A. gave legacies of 15 l. a-piece to each of his relations of his father and mother's side, and gave the surplus of his personal estate to B., and made C. his executor; the executor paid 15 l. to the testator's cousin-german, and 15 l. a-piece to her four children; and the court allowed the payment to the children, and would

2 Vern. 382,
 Jones and
 Beale. See
 Amb. 640.

not

not restrain the devise to the relations within the statute of distributions.

Preced.

Chan. 401.

Rouch v.

Hammond.

[So, Carr v.

Bedford,

2 Br. Ch.

Rep. 77.

Anon. 1 P.

Wms. 327.

Thomas v.

Hole, Ca.

temp. Talb.

251.

Harding

v. Glyn,

1 Atk. 469.

Attorney-General v. Buckland, (cited) Ambl. 71.

Edge v. Salisbury, Ambl. 70.

Whit-

thorne v. Harris, 2 Vez. 527.

Crosley v. Clare, Ambl. 397.

Isaac v. Desfrieze, *Id.* 595.

Widmore v.

Woodroffe, *Id.* 636.

Green v. Howard, 1 Br. Ch. Rep. 31.

Hands v. Hands, (cited) 3 Br. Ch. Rep.

69.

Phillips v. Garth, *Id.* 64.

Rayner v. Mowbray, *Id.* 234.

And the rule will be the same, though

the word "*poor*" be prefixed to "*relations*."

Brunsdon v. Woolledge, Ambl. 507.

Isaac v. Desfrieze,

Id. 595.

Widmore v. Woodroffe, *Id.* 636.

But if the bequest be to the testator's descendants, or to

the descendants of *A.*, the necessity of referring to the statute of distributions does not arise, for such

descendants are capable of being ascertained.

Crosley v. Clare, Ambl. 397.

Butler v. Stratton, 3 Br.

Ch. Rep. 367.

And we have seen above, that where the court does resort to the statute of distributions

for the purpose of limiting the objects of the bequest to relations, it does not consider itself bound to

adopt the proportions prescribed by the statute; but distributes *per capita*, and in such shares as any par-

ticular expressions of the bequest may call for.

Carr v. Bedford, 2 Ch. Rep. 77.

Griffith v. Jones, *Id.*

179.

Thomas v. Hale, Ca. temp. Talb. 251.

Green v. Howard, 1 Br. Ch. Rep. 31.]

3. What shall be a sufficient Description of the Thing given, and what shall be said to be bequeathed.

Godolph.

272.

(a) But in

another

place he

says, that

this rule

must be un-

derstood as

the testator

makes use of words in the present tense or future tense; and that if it be doubtful, whether they refer to

the time past or the time to come, they shall be understood to relate unto the time that is to come; and

that therefore if a man devise his corn indefinitely, it shall be understood all such as he hath at the time of

his death. Godolph. 274.

[The rule must certainly depend upon the particular expression of the

bequest, as where the testator gives a specific thing as being then in his possession, and which in its nature

is not fluctuating, and he gives it by a particular appellation. Thus, if he bequeaths the leases which

he now has, or all the horses now in his stable, or the arrears of an annuity now due, in such cases, sub-

sequent leases, or after-purchased horses, or arrears afterwards accrued due will not pass. 1 P. Wms. 597.

Attorney-General v. Bury, 1 Eq. Ca. Abr. 201.

Baugh v. Read, 1 Vez. jun. 260.]

Godolphin says, that in order to find out the testator's meaning, with respect to the things he intended to give away, it is necessary chiefly to regard the (a) time when the will is made; for it is a presumption of law that the testator's mind was not altered, unless it otherwise appear by sufficient evidence; therefore, says he, if a father bequeath to his son (who is a student) all his books, and afterwards buy other books, the books so bought pass not.

Swinb. 418.

Salk. 237.

pl. 16.

And *vide tit. Le-*

vises, let-

ters (B) and

(H).

But it seems clear, both by our law and the civil law, that a devise of all a man's personal estate passes whatever he died possessed of, and not that only which he had at the time of making his will; for the personal estate being transient and fleeting, and, from the necessity of dealing and traffick, liable to daily alterations; if the contrary resolution should prevail, it would put men under the difficulty of making a new will every day, and create the greatest perplexity imaginable.

Also, it hath been determined in Chancery, that if a man devises to his wife all his personal estate, at a place called *W.*, all his personal estate, as coaches, horses, &c. there at the time of his death, shall pass, though not there at the time of making the will, the personal estate being fluctuating and varying until the time of the testator's death. 2 Vern. 688.

If a man devise his house, and all his goods and furniture therein, to his wife for life, and after her decease, to his son *R.* and his heirs, except his pictures, which he gives to his sons *A.* and *B.*, and he has pictures in boxes as well as those hung up in the house, and likewise pictures at his death, which he had not at the time of making his will; and it is proved in the cause that he had skill in pictures, and frequently bought pictures and sold them again; the exception of the pictures shall extend as well to the pictures hung up as furniture as to those in boxes, and as well to those in the house at the time of the will, as to those bought in after the will made. 2 Vern. 538.
Gayre and Gayre.

But where a man devised to his niece all his goods, chattels, household-stuff, furniture, and other things, which then were or should be in his house at the time of his death; and some time after died, leaving about 265 *l.* in ready money in the house; it was decreed, that this ready money did not pass, for by the words *other things*, shall be intended things of like nature and species of those before mentioned. Abr. Eq. 201. Trafford and Berrige.
[See acc. Cook v. Oakley, 1 P. Wms. 302.
Timewell v. Perkins, Rep. 467.]

2 Atk. 105. Cornforth v. Boon, 2 Vez. 279. Cavendish v. Cavendish, 1 Br. Ch. Rep. 467.]

[Colonel Coddington devised to *All Souls College in Oxford* in these words, viz. *I devise my library of books, now in the custody of Mr. Carlwell, to All Souls College in Oxford*; and in the same will he devised to the College 4000 *l.* more to augment their library. The testator afterwards bought several books of value, which were placed in the said library. It was decreed, that the after-bought books should pass; the word *now* not relating to the books which were in the library at the time of making the will, but merely pointing out where the library was. All Souls College v. Coddington, 1 P. Wms. 597.

General Guise, by his will, gave all his pictures, drawings, and prints to *Christ Church College in Oxford*, to be kept, and none of them to be sold, they being a good collection. He lived several years afterwards, and after making his will, parted with some of the pictures, and acquired above one hundred new ones. Lord Camden said, he was clear, that the pictures which the General added to his collection after making his will passed by the devise to *Christ Church College*, upon this principle, that the personal estate is considered as fluctuating. It would be so in case of a devise of all a man's personal estate generally. The same rule holds in case of a devise of the whole of any species of his personal estate. Cases have gone so far as to extend the rule to the devise of a flock of sheep. The case of *All Souls College v. Coddington* confirms this rule. The case of *Gayre v. Gayre* is in point. Dean of Christchurch v. Barrow, Ambl. 641.

A testator bequeathed his wife 1200 *l.* in money, and all the goods and chattels, &c. in and belonging to his house in *N.*, in which Anon. Pr. Ch. 8. But if there be

nothing in a will demonstrating an intention to restrict the general import of the words "goods and chattels," money, if not an extraordinary sum, and just received, will pass. *Chapman v. Hart*, 1 Vez. 273.

Woolcombe v. Woolcombe, 3 P. Wms. 112.

which house there was 400*l.* in money; and the question was, Whether this 400*l.* should pass by the will? The court held, that it should not; for 400*l.* is a considerable sum, and the testator could not be supposed to be ignorant of its being in the house: therefore, had he intended to pass it, he would not have couched it under general words, but would at first have given his wife 1600*l.*

money, if not an extraordinary sum, and just received, will pass. *Chapman v. Hart*, 1 Vez. 273.

There was a bequest of all the testator's household goods, and other goods; and there was also a bequest of the residue; which bequest of the residue would have been frustrated, had the words "other goods" been held to carry all the personal estate. The court therefore held, that the words "other goods" must be intended to signify things of the like nature with household goods.]

2 Vern. 747.
Gillb. Eq. Rep. 172.
decreed between the Earl and Countess of Shaftesbury.

If *J. S.* bequeaths all his household goods and furniture which should be in his house at *R.* at his death to his wife, and afterwards going beyond sea, his steward gets the head landlord of the house to accept of a surrender of the lease of the house, and removes the goods to another house, and writes an account of this to *J. S.*, who approves of it, the goods will not pass by the will to the wife: otherwise, if they had been removed by fraud to defeat the legacy, or by any tortious act without the privity of the testator.

2 Vern. 739.
decreed between the Duke of Beaufort and Lord Dundonald.
[Lord Hard-

So, if a man bequeaths to his son the furniture of his house at *D.*, and two years afterwards orders goods which he had bought in *London* to be carried to his house in *D.*, and agrees with carriers for that purpose, but dies before the goods are removed from *London*, these goods shall not pass by the will as part of the furniture of the house at *D.*

wicke alluding to this case says, "there was very little opposition, being between a mother and a son, and I lay no stress upon it." 3 Atk. 202.]

Chan. Ca. 16. Lee and Hale.

If a man who has debts due to him by bond, and who is likewise possessed of a term for years, bequeaths one moiety of his personal estate to his wife, and afterwards several legacies to other persons, and the residue to *J. S.*, the wife shall have one complete moiety, if the other is sufficient to pay the debts, and she shall have a moiety of the lease, though it was objected that a lease was not usually reckoned personal estate.

Portman v. Willis, Cro. Eliz. 387.
But see Godolph. 392. 7.

If a man possessed of a lease for years bequeaths several legacies of plate and other goods to several persons, and after devises all the residue of his goods to his wife, his debts and legacies being paid, and makes her sole executrix; by this will, the lease passes to her as legatee; for though by a grant of *omnia bona* a lease passes not, yet, by the civil law, *bona* including all chattels, and this being a legacy, the judges of the common law in this case ought to be guided by that law.

2 Chan. Rep. 190.

If a man bequeaths 1200*l.* to *J. S.*, and by general words gives all his goods, chattels, and household-stuff in and about his house to the said *J. S.*, money in the house will not pass, he having a particular legacy devised to him.

[A bequest

[A bequest of all the testator's goods has been holden to pass a bond, unless there be some words in the will which demonstrate an intent to the contrary (*a*). But bonds, as a species of choses in action, not admitting of locality, will not pass under a bequest of goods and chattels in a particular place (*b*). Neither will debts due by bond pass under a bequest of all the testator's moveable goods (*c*).

3 P. Wms. 112. note in Cox's Ed. (*b*) Chapman v. Hart, 1 Vez. 271. Moore v. Moore, 1 Br. Ch. Rep. 127. Green v. Symonds, *Id.* 129. note. (*c*) Sparke v. Denne, Sir W. Jones, 225.

Plate (*d*) and jewels will not pass by a bequest of utensils, but (*d*) Dyer, 59. (*e*) Lilcot

v. Compton, 2 Vern. 638. [This was formerly denied, Jeffon v. Effington, Pr. Ch. 207. but it seems now settled, agreeably to this case of Lilcot v. Compton, that plate will so pass, where it appears, that the testator was in the habit of using plate, or was of a rank in life which rendered it an article suitable to his domestic establishment. Masters v. Masters, 1 P. Wms. 425. Nichol v. Osborn, 2 P. Wms. 419. Snellson v. Corbet, 3 Atk. 369. Kelly v. Pawlett, Amb. 605. S. C.]

If a testator miscalculate a residue, or a debt which he bequeaths, the real residue or debt will nevertheless pass.]

Rep. 18. Williams v. Williams, *Id.* 87.

If a nobleman possessed of a collar of SS, and of a garter of gold, and a buckle annexed to his bonnet, and many other buttons of gold and precious stones annexed to his robes, and of many other chains, bracelets, and rings of gold and precious stones, bequeath all his jewels to his wife, and die, the garter and collar of SS pass not, because they are not properly jewels, but ensigns of honour and state; and the buckle in his bonnet and buttons pass not, because annexed to his robes; but all the other chains, rings, bracelets, and jewels pass.

J. S. by will devises thus: *Item*, my will and pleasure is, that the furniture and pictures in my houses at *A.*, *B.*, and *C.* shall always remain there, and not in the power of my executors to dispose of, but shall go with my said houses to such of my grandchildren as shall be in the possession thereof, and then appoints that the plate gilt with gold, belonging to his chapel at *A.*, together with the ornaments thereof, should remain to the perpetual use of the said chapel, and makes *D.* executor, to whom he gives all his personal estate, except what is before bequeathed, of what nature or kind soever, for his own proper use; and the question was, if the plate the testator constantly used, and removed with him when he went from one house to another, should go to the executor by the last clause, or belong to the houses under the word *furniture*? And my Lord Keeper was of opinion, that furniture in a large sense takes in plate, but not here, because he distinguishes the chapel plate from the furniture; and the plate of ordinary use that was carried with him could no more be said the furniture of one house than of the others, and he meant only the particular furniture of each house; so the plate went to his executors, and was liable to plaintiffs who were creditors.

[A library will not pass under the description of furniture.]

Bridgeman v. Dove, Amb. 605.

3 Atk. 201. Kelly v. Powlett,

If

Abr. Eq.
201. Mose-
ley, 47. S. C.
S. P. Hunt
and Berkley.

2 Chan.
Ca. 198.
Martin and
Clark.

If a man devises his silver tea-kettle and lamp, with the appurtenances, nothing shall pass but the kettle and lamp, and the box wherein the lamp was placed, and not the silver tea-pot, milk-pot, tongs, strainer, or canisters.

If a man devises 40 l. to be paid to J. S., by him to be disposed of in such manner as the testator should by a private note acquaint him with, and dies without such appointment, this is a good bequest to the party.

(C) What shall be an Ademption or Extinguishment of a Legacy.

Swinb. 522.
526.

Swinburne distinguishes between the ademption and translation of a legacy: the first, he says, is the taking away a legacy which was before bequeathed, which may be done by an express revocation thereof, or it may be done secretly and by implication, as by giving away, or voluntarily alienating the thing devised. Translation of a legacy is the bestowing of the same upon another, which is likewise an ademption; and therefore there may be an ademption without a translation, but there can be no translation without an ademption.

Swinb. 522.

The ademption of a legacy is no more to be presumed than the revocation of the testament, unless it be proved; and therefore if the testator bequeath all the corn in his barn, and live after the making of his will till the corn is spent, and other corn be put in the place thereof, this spending of the corn is no ademption of the legacy, and therefore the legatee shall have such corn as is found in the barn when the testator dieth, unless the corn found in the barn at the death of the testator be greater in quantity than was the corn at the time of the will made; for so much is due, but not a greater quantity than was the first.

Swinb. 522.

So, if the testator bequeath a ship, and afterwards, by piece-meal, repair and renew the same, so that there remain nothing of the old ship but only the bottom tree, here is no ademption of the legacy, but the legatee may recover the whole ship.

Swinb. 523,
524.

If a man bequeath a house, which afterwards he voluntarily pulls down, or which is blown down by the wind, or is consumed by fire, and afterwards he erect a new house where the old house stood; *Swinburne* is of opinion, that the legatee in neither of these cases can have the new house; it being a general rule of the civil law, that a house bequeathed being destroyed, if the testator build another in the same place, the legacy is extinguished, unless the meaning of the testator were otherwise.

Swinb. 523.

But if the testator bequeath an house, and afterwards, by piece-meal, repair the same, so that there is no part of the old matter or stuff remaining, the will of the testator is not hereby presumed to be changed; and therefore the legatee may recover the house so repaired, for it is deemed to be the same house still in law.

Swinb. 524.

Also, if the testator, being constrained by necessity, as for the payment of his debts, supplying himself or his family with food
and

and necessities, &c. alienate the thing bequeathed; this is no ademption of the legacy, and therefore is the executor bound to redeem the same, or to pay the just value to the legatee.

So, if the thing bequeathed be not fully alienated, as if it be pledged or pawned, the legacy is not thereby extinguished; and therefore the executor in this case is bound to redeem the same, and to restore it to the legatee, or to pay the price thereof, if he suffer it to be forfeited. Swinb. 525i

If a legacy be given to one person, and afterwards in the (a) same will the same thing be given to another, this is not an ademption of the legacy as to the first person, for the utmost constancy shall be presumed in the testator, till the contrary appears; and therefore in this case they shall divide the legacy between them. Swinb. 528.

To another, this would be no ademption, unless it appeared the testator's intention that it should be so, as if he had said, *that which I did bequeath to A. I give B.*, these or the like words wholly take away the legacy. Swinb. 529.

If a man bequeath a legacy in these words, *viz. I give to my niece A. 500l. which my sister B. hath now in her hands of mine, as by bond appears*; and after the money be paid, and ten years after payment thereof the testator die, yet the legacy is good, though the security is altered; for by the words, no more is intended, but that the legacy should be as sure as he could make it. Raym. 335. Pawlett's case.

Again, a man devised in the following manner, *viz. I give and devise to A. my good and only uncle, the sum of 500 l.* that is to say, that bond and judgment he gave me for 400 l. and 100 l. in money, and made his wife executrix, and desired her to be kind and assisting to his uncle, that he might live as became a gentleman; the uncle some time after sold an estate, and with the money paid off 320 l., and took up the bond, and had the judgment vacated, and gave a new bond for the remaining 80 l., and some time after the testator died, and the uncle having notice of this will, brought his bill for this legacy of 500 l. For the executrix it was insisted, that this was a specifick legacy of that particular bond and judgment, and they being cancelled and altered before the testator's death, it was an ademption of the legacy as to so much: and besides, they urged, that this payment of the 320 l. amounted to a release, so that he could only be entitled to the residue. On the other side it was insisted, that the diversity (b) is where the money is voluntarily paid in by the person who owes it, and where the testator sues for and recovers it: in the first case, the legacy continues still good, because the money only comes home to the personal estate; but in the other case, the testator suing for it, shews that he intended to make it his own, and therefore would not leave it to the legatee to recover; and the justice of the uncle ought not to prevent the affection of the nephew; and no alteration of his intention appeared. My Lord Keeper was clear of the same opinion, and decreed the 80 l. bond to be delivered up, and the residue of the legacy to be paid. Abr. Eq. 302. Orme and Smith. 2 Vern. 611. S. C. [(b) Lord Camden, in speaking of this case of Orme v. Smith, says, "the payment was clearly voluntary. The counsel laid hold of the distinction between a voluntary and compulsory payment, but the court does not appear to have decreed upon the distinction." But in Crockat v. Crockat, 2 P. Wms. 162. and Rider v. Wager,

Id. 328. the distinction is taken notice of by the court. And in Partridge v. Partridge, Ca. temp. Talb. 326. it is recognized by Lord Talbot, and in Lawson v. Stinch, 1 Atk. 508. by Lord Hardwicke. At the same time it must be observed, that the decree of the court is founded upon other points in every

of these cases. In *Earl of Thomond v. Earl of Suffolk*, 1 P. Wms. 467, Lord Macclesfield over-ruled the distinction, and the same was done by Lord King in *Ford v. Fleming*, *infra*. In *Ashton v. Ashton*, 3 P. Wms. 386, Lord Talbot declares his idea, that the distinction has no weight in it. Its existence is denied by Lord Camden in *Attorney-General v. Perkin*, Amb. 566; and that opinion is adopted by Lord Thurlow, in *Ashburner v. Macguire*, 2 Br. Ch. Rep. 109. Other judges admit the distinction, but not as a rule of determination in all cases. They consider the testator's calling for payment not to be *of itself* sufficient evidence of an intention to adeem, (and adeemption must always depend upon intention;) but at the same time they regard it as a questionable act requiring explanation. *Drinkwater v. Falconer*, 2 Vez. 623. *Hambling v. Lister*, Amb. 401. *Coleman v. Coleman*, 2 Vez. jun. 639.]

Crockat v.
Crockat,
2 P. Wms.
164.

[A testator gave his sister S. C. 550*l.* which was then in Mr. E.'s hands, and died soon after the making of his will. It appeared, that the testator, before the making of his will, had left in Mr. E.'s hands 550*l.*, for which Mr. E. had given a note to the testator, payable to him or order, and the testator had, before the making of the will, drawn some bills on E. ordering him to pay several sums of money, which, in all, had reduced the 550*l.* to 430*l.* The testator had left assets for the payment of all his legacies, including the whole legacy of 550*l.* to his sister S. C. It was insisted, that S. C. should have no more than 430*l.* of her legacy of 550*l.* there being no more than 430*l.* left in Mr. E.'s hands. But the Master of the Rolls held, that she should have the whole 550*l.* legacy. These payments out of the 550*l.* in the hands of Mr. E. having been all ordered by the testator before the making of the will, this cannot be said to be an adeemption of the legacy, but is an express indication of the testator's intention, that as the note for the full sum of 550*l.* was still standing out, notwithstanding he had ordered the payment in part of the note, yet he renounced all those payments, and willed that the whole 550*l.* should be the legacy which he gave to his sister S. C. His Honour therefore decreed the plaintiff S. C. the whole 550*l.* note, and interest from the time of filing the bill.

Rider v.
Wager,
Id. 328.

A. having a debt due to him from D. bequeathed 500*l.* part thereof to B. the second son of D., and the residue thereof to the younger children of D. to remain in D.'s hands until the children should be capable of receiving it; the share of any of them dying before such time to go to the survivors or survivor. A. calls in, and receives the whole debt in his lifetime; and B. dies in the lifetime of A. Then A. died in the lifetime of the younger children. Lord King said, that it could not be intended the survivor should take, unless B. the legatee should have survived the testator, so that the right to the legacy became vested in him; but that B. dying in the lifetime of the testator, as nothing could ever vest in him, so neither could it survive from him. His Lordship admitted, that where a devise is to A. for life, remainder to B., and A. dies in the testator's lifetime, B. shall take presently; or if a devise be to A. and B., and A. die in the testator's lifetime, and then the testator die, there, B. shall have the whole; for these cases seem to be within the plain intent of the testator: but that, in the principal case, it was quite a strain to support a legacy given out of a fund which the testator had by his own voluntary act put an end to; for which reason he declared, that these legacies to the younger children were extinct, and should not be made good.

A. be-

A. bequeathed 1000*l.* capital *S. S.* stock to *B.* At the time of making his will he had 1800*l.* of such stock, and afterwards by sale reduced it to 200*l.*, but afterwards increased it to 1600*l.*, and died. Between the making of his will and his death, the act took place which changed three-fourths of the capital *S. S.* stock into annuities. Lord *Talbot* held, that this legacy was not adeemed or impaired either by the sale or the act of parliament. Not by the former, for all cases of ademption arise from a supposed alteration of the intention of the testator; and if the selling out of the stock is an evidence to presume an alteration of such intention, his buying in again is as strong an evidence of his intention that the legatee should have it again. It was not the particular stock he was possessed of that he gave; but the devise was only describing the nature of the thing he gave, of which he had sufficient to answer such legacy at the time of his death. If the testator after such legacy sells out part, and dies, such sale would afterwards be looked upon as an ademption *pro tanto*. If he devises so much stock, and at the time of such devise has not any such stock, it is a direction to the executor to procure so much for the legatee. It would be very hard in this case to consider the selling as an ademption, because he might sell out for some particular purpose, and as soon as that purpose was answered he might buy in again.—It was not affected by the act of parliament, for it would be extremely hard to say, that this alteration of stock by parliament should work an ademption, when it cannot be presumed the testator's intent was particularly asked, or that he concurred or agreed to such law in any other manner than what every other person is supposed to do. His Lordship added, If an obligee were to devise a legacy of 1000*l.* secured by bond from *A. B.*, and he should afterwards compel *A. B.* by due course of law to pay it him, this would be an ademption of the legacy; but it was never thought, if *A. B.* should pay in the money voluntarily, it would be an ademption, because the obligee is bound to receive it.

Partridge v.
Partridge,
Ca. temp.
Talbot. 226.

Bronfson v.
Winter,
Ambl. 57.
S. P.

A. and *B.* (afterwards Countess of *Suffolk*, and since deceased) were each indebted to *J. S.* in 2000*l.* secured by bonds. *J. S.* bequeaths these two sums of 2000*l.* and 2000*l.*, and all interest due for the same to her grand-daughter *C.*, and devises away the surplus of her estate, with a proviso, “that in case all or any part of these sums should be paid in before the testatrix's death, then she gives to the said *C.* 4000*l.* or so much money as the principal money so paid in should amount unto, as the case should fall out.” Afterwards, the testatrix in her lifetime, released to *A.* the 2000*l.* due upon his bond without having received any part of the money, and died; and *C.* died intestate; upon which the said *A.*, who was her brother, administered to her, and demanded the 2000*l.* released to himself upon his bond, and also the 2000*l.* due upon *B.*'s bond. With respect to the former (the only one material to notice in this part) it was objected, that the release of the bond to *A.* was a revocation, or ademption of the legacy *pro tanto*, it being the voluntary act of the testator. But

Earl of Tho-
mond v.
Earl of Suf-
folk, 1 P.
Wms. 461.

by Lord *Parker*, the testatrix intends by this will (amongst other things) to make a provision of 4000*l.* for her grand-daughter *C.*; and though she has shewn her kindness to her grandson (one of these bonds being given by him for 2000*l.*), yet this noways imports an alteration or diminution of her kindness to her grand-daughter. I cannot approve of the diversity, that if the testator gives away a debt by his will, and afterwards calls it in, this must be a revocation; *scilicet*, if it be paid in to the testator unasked for; for suppose the testator called in that debt, fearing it might be lost, and not liking the security; is there any reason that this should deprive the legatee of his legacy? And the case of *Orme* and *Smith* proves that the testator's receiving in the debt is no revocation or ademption of the legacy. As to the matter of the release, that surely implies payment and satisfaction of a debt, being tantamount to the testator's receiving it, and giving it back again; and in the present case, it is the same, as if the will had said, *if these debts be paid or discharged.*]

Abr. Eq.

302.

Ford and

Fleming,

[2 P. Wms.

469. S. C.

2 Str. 823.

S. C.]

One by will devised thus: *Item, I give and bequeath to my grand-daughter Mary Ford (the plaintiff) the sum of 40*l.* being part of a debt due and owing to me for rent from G. M. she allowing what charges shall be expended in getting the same. Item, I give and bequeath unto my grandsons A. and B. the rest and residue of what is due and owing to me from the said G. M. which is about 40*l.* to be equally divided between them, they allowing charges as aforesaid.* Afterwards the testator received the whole debt owing for rent from *G. M.*, and for the plaintiff it was insisted, that there was a difference between a specifick and a pecuniary legacy; that though the disposing of a specifick legacy might be an ademption of it, yet this being a pecuniary legacy, the paying of the money to the testator would not be a loss of it. On the other side it was insisted, that there was a difference between a voluntary and compulsory payment, that though the first was no ademption, yet the second was, and that the testator obliged *G. M.* to pay in the money. But my Lord Chancellor was of opinion, that there was no foundation for the difference taken in the books between a voluntary and compulsory payment, for the latter might be with an intent to secure the legacy at all events, and decreed the plaintiff the 40*l.* legacy.

Attorney-

General v.

Parkin,

Ambl. 566.

[A testator enumerates mortgages, bonds, and notes due to him; and gives out of the interest an annuity to *A.* for life, and after her death, directs the securities to be vested in trustees for charitable uses. After the making of the will some of the securities are paid off, (whether voluntarily, or not, did not appear,) and new ones taken. Lord *Camden* held, that this was a money legacy, a bequest of so much money as was equal to the money owing to the testator on the several securities: that where the intention of the testator was to give a money legacy, there could be no reason to support the distinction between a voluntary and a compulsory payment; and that therefore the receipt of the money on the securities could not be construed to be an ademption of it.

E. being

E. being entitled to 840*l.* lent upon mortgage in trustees' names, bequeathed to the plaintiff 100*l.* to be paid by the trustees out of the mortgage money, as soon as the same should be received; and gave him 100*l.* more to be paid out of the said mortgage, when the same should be received. After making the will, there being a considerable arrear of interest upon the mortgage, and the principal and interest amounting to 1250*l.*, the testatrix agreed to a composition, and accepted 1000*l.* for the whole that was due; and within a short time afterwards laid out the money which she so received upon other securities. On a bill by the plaintiff to be paid his legacy out of the assets, the question was, Whether the receiving of the mortgage money was an ademption? The Master of the Rolls said, that (to be sure) an alienation of a legacy, if there is nothing else in the case, is an ademption, and equity will not set it up again: that the inference he drew from the cases was, that there must be an indication of change of mind to work an ademption. A debt given specifically, and called in, and no account appearing why it was called in, is an ademption; but if any account is given, it is otherwise. It is the intention that governs. It was so in the Roman law. *Just. Inst.* 2. 20. 12. The receiving of the money in the present case is accounted for: the debt was increased from 840*l.* to 1250*l.*, it was in so much danger, that the testatrix took 1000*l.* for it. He did not agree, he said, to the distinction taken in some of the cases between voluntary payment and being called in, as laid down generally: at the same time he did not go so far as Lord Talbot, in *Ashton and Ashton*, 3 *P. Wms.* 384., and say, that the calling in a debt by the testator is not an ademption, because it might be from an apprehension of such debt being in danger; but if there is proof that it was called in for any other reason than an intention to adeem, he thought it not an ademption. His Honour therefore decreed the legacy and interest to be paid to the plaintiff out of the money which was received in, and laid out on other securities.

Hambling v. Lister,
Ambl. 402.

A. bequeathed a moiety of two-thirds of the residue of his *South Sea* stock, *India*, Bank, and Orphan stock, leases, *East India*, and *South Sea* bonds, mortgages, and other his personal estate to *B.*, who, before he received his legacy, made his will, and devised this moiety to trustees, to sell and pay 200*l.* thereout to *C.*, and the residue of the money to *D.* Afterwards *B.* and the legatee of the other moiety came to an account with the executor of *A.*, and their shares are set out and received, and the stock and bonds are allotted to *B.*, who sells part of them in his lifetime, without keeping an account of the produce. It was decreed, that this was an ademption of the legacy to *D.* *pro tanto*. But the bare receipt of his share by *B.* it was said, was no ademption, for it did not shew any change of his mind, but was done in concert with the other legatee, to ascertain their moieties, and prevent survivorship.

Birch v. Baker, Mos.
375

One partner by his will gives to his partners one-ninth of one-twelfth of the profits reserved to him by the terms of the deed of

Backwell v. Child,
Ambl. 260

co-partnership. He afterwards, on the expiration of the partnership, enters into fresh articles with the same partners, under which they take a greater interest than they had under the former articles. Lord *Hardwicke* held, that the renewal of the articles was no ademption.

Abbott v. Macguire,
2 Br. Ch.
Rep. 108.

A testator bequeathed (*inter alia*) as follows: “*Item*, I bequeath to my sister *J. A.* the interest arising from her husband “*W. A.*’s bond to me for principal 3500 *l.* sterling during her life, “independent of her present, or any future husband, amounting “to 175 *l.* sterling *per annum*. *Item*, I bequeath the principal of “the said bond, on the decease of my said sister *J. A.* to her four “daughters (naming them) to be equally divided among them or “the survivors of them. *Item*, I bequeath to Mr. *W. B.* my “capital stock of 1000 *l.* in the *India Company*’s stock.” *W. A.* the debtor became a bankrupt after the making of the will, and in the testator’s lifetime, and the testator proved his debt under the commission, and received a dividend thereon. After the testator’s death, another dividend was made to the bankrupt’s creditors. The testator, at the time of making his will, was possessed of 1000 *l.* *E. I.* stock, and no more; but sold out the whole of it before his death. Lord *Thurlow* held, that the bond was given as a specific legacy; that the receiving the dividend upon it under the commission was no ademption of it, and directed that the bond should be delivered up to the legatees, that they might receive the dividend not received by the testator, and whatsoever else might be thereafter payable out of the bankrupt’s estate in respect of that debt. But as to the legacy to *W. B.* he held, that that was clearly adeemed: that it was a specific legacy, and the testator having sold the stock after making the will, it was as if it had never existed.

Badrick v. Stevens,
3 Br. Ch.
Rep. 431.

A testatrix bequeathed several sums of money to different persons, to be paid within three months after her decease out of a bond-debt due to her; the obligor in the bond, who was one of the legatees, paid the debt with interest and took up the bond in the lifetime of the testatrix; but whether voluntarily, or upon demand, did not appear. The legacies were holden to be adeemed by this payment.

Savile v. Blacket,
1 P. Wms.
777.

Sir *E. B.* by his will gave to his two daughters 2000 *l.* a-piece, to be paid in the manner therein mentioned, that is, 500 *l.* part thereof he directed to be charged upon, and raised out of premises comprised in his marriage settlement, on which he declared by his will he had power to charge 1000 *l.* The testator had joined with his son in a recovery of these premises, and had thereby (according to the opinion of the court, on a question raised in the cause) extinguished his power to charge. Lord *Macclesfield*, upon the hearing, for further directions, notwithstanding these sums had been charged on a fund which failed, decreed them to be paid out of the testator’s personal estate.

Coleman v. Coleman,
2 Vez. jun.
639.

A. by his will gave the interest of a bill of exchange for the sum of 1500 *l.* on the *East India Company* to his wife for life, and directed, that after her death the bill should be sold, and the money

money arising thereby divided between his nephews and nieces, with benefit of survivorship. After making his will, the testator received from the *E. I. Company* the said sum of 1500*l.* due on the said bill, and he lent it upon personal security. Some time after he called in 100*l.* which he lent to *J. H.*, who became insolvent. The remaining 1400*l.* remained due at the death of the testator from the person to whom it was lent. It appeared that this bill constituted the bulk of the testator's fortune. The payment of the bill was decreed to be no ademption.]

If testator bequeath 100*l.* to a man, and in the same testament give him 100*l.* without taking notice of the first 100*l.*, the second disposition is understood to be but a repetition of the former, and all but one legacy, unless it appears that the testator intended him 200*l.* in all.

[But if two legacies of equal sums are given to the same person, the one by the will, the other by a codicil, the second bequest is construed *primâ facie*, a duplication.

Though this difference between the legacies being in the same will, and being one in the will, the other in a codicil, is mentioned as a strange distinction by *Mr. J. Aston*, in his learned argument in *Honley v. Hatton*, 1 Br. Ch. Rep. 390. note. Yet he seems afterwards to admit it as settled. But notwithstanding the legacies are in different instruments, yet if they be not given simply, but for a reason expressed, which reason is the same both in the will and codicil, it denotes the intention of giving but one bequest, and such intention must prevail. *Duke of St. Alban's v. Beauclerk*, 2 Atk. 640. 1 Br. Ch. Rep. 392. note. On the other hand, if the wording of the gift in the codicil be varied from that in the will, and mark the legatee as an object of the testator's peculiar favour, this corroborates the *primâ facie* presumption of law, that the latter should be an additional legacy. 1 Br. Ch. Rep. 393. And this seems to hold where there is but one instrument. 2 Br. Ch. Rep. 528.

So, if the sums in the will and codicil be unequal, whether the latter be the greater or the smaller of the two, they shall be taken accumulatively.

V. Pile, 2 Br. Ch. Rep. 225. Extrinsic evidence of intention may be taken into the account in these cases; for the ambiguity of presumption, whether a legatee shall have two legacies, does not arise simply from the construction of words; but is a presumption *donec probetur in contrarium*. 2 Br. Ch. Rep. 267. Hence an increase of fortune to the testator after the making of the will, and before the date of the codicil, has been considered as a circumstance that he intended additional bounties. 1 P. Wms. 424.

So, where a testator bequeathed 300*l.* to be paid to the child he should have at his death, and if he should have none, then to his sister; and afterwards, having three children born, he gave by a codicil 200*l.* to each of them, to be paid at their respective ages of 21 years; it was decreed, that the latter bequest being without words signifying the same to be for their portions, or any thing either to revoke or affirm the former gift, it should be taken by way of accumulation, and the children should equally divide both legacies.

But where a testator having made a codicil containing several legacies, afterwards made a second precisely to the same effect, with the addition of only one pecuniary legacy, his intention was thought to appear, that there should be but one codicil, and the latter only was decreed to stand.]

A. devises to his younger son 750*l.* and afterwards buys him a cornet of horse's commission, and paid 650*l.* for it; and it was proved to be intended this 650*l.* should be discounted out of the legacy, and that he would strike so much out of his will as soon

Swinb. 539.
Greenwood v. Greenwood, 1 Br. Ch. Rep. 20. note.

Ridges v. Morrison, 1 Br. Ch. Rep. 389.

Masters v. Masters, 1 P. Wms. 423. *Curry*

Pit. v. Pidgeon, 1 Ch. Ca. 301.

Coote v. Boyd, 2 Br. Ch. Rep. 521.

Preced. Chan 263.
Holkins and Holkins.

as the accounts came from *London* to him, but he died before they came, without altering his will; and it was held, that this money paid for the commission should go in diminution of the legacy, and be taken in payment and satisfaction for so much.

²Vern. 115. If *A.* by will devise 200*l.* to his daughter, and afterwards on her marriage gives her more than that sum, this is an extinguishment of the legacy.
Jenkins and Powel, and there the case of *Elken* Head cited, where payment in the testator's lifetime was adjudged a satisfaction of the like sum devised.

Vern. 95. So, where the testator directed that 400*l.* should be laid out in finishing a house which he was building; and lived after the making of the will, to expend a greater sum in that service; it was decreed against the heir at law, that this was an extinguishment and satisfaction of the 400*l.* although the house was not completely finished at the testator's death.
Husbands v. Husbands.

(D) Where a Legacy shall be presumed to be a Satisfaction of a Debt or Duty owing from the Testator.

Abf. Eq. 203. Salk. 155. pl. 5. 2 Salk. 508. 2 Vern. 177. 258. 298. **T**HE intention of the testator being the prevailing rule to go by in the construction of wills, it has been from thence established as doctrine, that wherever a person, by his will, gives a legacy as great or greater than the debt he owes to the legatee, that such legacy should be a satisfaction of the debt, on the presumption that a man must be intended just before he is bountiful, and that his intent is to pay a debt, and not to give a legacy.

²Vern. 111. As, where a man by marriage settlement provides 400*l.* for daughters, and having two daughters, by will gives them 200*l.* a-piece for their portions, without taking notice of the settlement; it was held, that the 200*l.* a-piece should be a satisfaction of the portion by the settlement.
Bloyes and Bloyes cited to have been adjudged.

²Vern. 498. So, where a man had prevailed on his wife to join in selling 7*l.* 10*s.* *per ann.* of her jointure, and after 6*l.* 10*s.* *per ann.* more, and having given two several notes, that his executor should pay her the said two several sums during life, he after makes his will, and thereby gives her 14*l.* *per ann.* during life, out of certain lands; this was held to be a satisfaction of the notes.
Preced. Chan. 240. S. C. Brown v. Dawson.

Preced. Chan. 138. Bromley v. Jeffreys. So, where one settles his estate on trustees, to be sold for payment of his debts, with power of revocation; then he marries a daughter, gives her a portion, and covenants that the husband shall have the estate 1500*l.* cheaper than any other; after he, by will, revokes the settlement, gives the husband 1500*l.*, and dies; this legacy was held to be in satisfaction of the 1500*l.* secured by the settlement.

Bruen v. Bruen, 2 Vern. 439. [So, where a term was created by a marriage settlement to raise 3000*l.* for daughters' portions, within 12 months after the death of

of the survivor of husband and wife, and there being one daughter, the father devised the trust estate to make good his wife's jointure, and to raise 3000*l.* for his daughter's portion; it was holden, that the will should be taken as relative to the settlement, and construed for the better securing the 3000*l.* by the settlement, and not as another devise of 3000*l.*

So, where a testator bequeathed 1000*l.* a-piece to each of his five daughters, and after legacies paid, gave the surplus of his lands equally amongst his five daughters, and afterwards gave 1000*l.* portion with one of them in marriage, she was excluded from the 1000*l.* intended by the will.

J. S. settled his estate on himself for life, remainder to his first *℥c.* son in tail male, with a proviso, that if *B.* his son should die without issue male, and leave a daughter, the trustees should raise out of part of the premises 5000*l.*, to be paid to such daughter within a year after her marriage, or at her age of twenty-one, which should first happen. *B.* on his marriage settled the said estate (including the premises charged with the 5000*l.*) on himself for life, remainder to his first *℥c.* son in tail male, remainder to trustees for 200 years, in trust to raise 8000*l.* for daughters' portions (if no issue male), payable at eighteen (*a*), if then married, or at any time after, when married. *B.* having no issue male, devised all his lands to *C.* in tail male, chargeable with his legacies, and bequeathed to *E.* his daughter for her portion 8000*l.* viz. 4000*l.*, part of it to be paid at her age of 18 years, and 4000*l.* residue thereof, within a year after marriage, or in all events at 21; and bequeathed to her 120*l.* *per ann.* until 18, and afterwards 200*l.* *per ann.* for her life. *E.* the daughter brought her bill for the recovery of all those sums of 5000*l.*, 8000*l.*, and 8000*l.*, insisting that none of them being given in satisfaction of the other, and it being the case of an heir at law, and these sums payable at different times, some less beneficial than others, therefore all these portions, or at least the 5000*l.* given by the grandfather, and the 8000*l.* given by the father, should be paid her: but Lord *Harcourt* decreed, that she should have but one 8000*l.*, but that, when of age she might elect which of the portions she pleased.]

So, if *A.* by marriage articles, agrees to leave his wife 800*l.* and her jewels, *℥c.* but it is declared, that, notwithstanding the articles, she should not be debarred of any thing he should give her by will; and *A.* by will makes a disposition of his whole estate among his children, *℥c.* and gives his wife 1000*l.* The wife must waive the articles, or the will, for she cannot have both; for his making a disposition of the whole estate, shews that he intended that every part should be performed.

So, where a child, entitled by his father's marriage articles to a share of his father's personal estate, had a legacy given to him by the will of his father; it was held, that, if he will have the legacy, he must waive the benefit of the articles.

So, where a freeman of *London* made his will, and devised legacies to his children more than their orphanage parts would amount to, without taking any notice whatsoever of the custom; it

Elken Head's case, cited in 2 Vern. 257.

Copley v. Copley, 1 P. Wms. 147.

(a) The time of payment does not appear in Reg. Lib. though much insisted upon in argument.

2 Vern. 555. Herne v. Herne.

2 Vern. 556.

Trin. 1729, Nicholls v. Nicholls.

it was held by the Master of the Rolls, that these legacies should be a satisfaction of their orphanage shares, to which they were entitled by the custom in the nature of a debt; and that the legacies should not come out of the testamentary or dead man's part, because it is held in this court, that they shall not take both by the will and the custom too; but where such legacies are less than their orphanage shares, whether they shall be *pro tanto* a satisfaction, he was in great doubt, and sent it to the city to certify, though he seemed rather to think they should in that case take both, especially, if none of the devisees in the will were thereby disappointed.

Johnson v.
Smith,
2 Vez. 314.

[*J. S.* by deed-poll assigned all his securities to the value of 7000*l.* to a natural daughter, but afterwards treats them as his own, not having delivered the deed to her. About six months before he died, he executed and delivered to her a bond for 10,000*l.* payable in three months after his decease. He afterwards made his will, and devised to her his real estate, provided she married *W. J.*, but in case of her refusal, he gave it to *W. J.* He likewise bequeathed her all his personal estate, and made her executrix. She refused to marry *W. J.* It was decreed, that the daughter was not entitled to the benefit of the deed of assignment and the bond, but must make her election.

Baugh v.
Reed, 3 Br.
Ch. Rep.
192.

The testator *James Reed* the elder had six children, *James, Sarah, Mary, William, Thomas, and Charlotte*, who were entitled under the will of their grandfather, upon their attaining their respective ages of 23 years, to two sums of 5000*l.* each, which had been paid into the Bank under an order of the court of Chancery, and laid out in the purchase of 11,315*l.* 8*s.* 4*d.*, 3*per cent.* Bank annuities, which being divided into six parts, came to 1885*l.* 18*s.*, and a fraction of a penny each. Such of the children as had attained their ages of 23 before the testator made his will, *viz. James, Sarah* (now *Sarah Jones*), and *Mary* (late *Fyde* deceased), had applied for their shares, which had been transferred to them; and *James Reed*, the eldest son, transferred his sixth, the 4th September 1783, to the testator his father; *Sarah*, the eldest daughter, on the 8th February 1784, executed a power to the house of *Escot, Reed, and Co.*, for transferring her sixth of the said stock; but the same was a general power to accept, receive dividends, and transfer, not naming to whom. The daughter *Mary* and her husband *R. Fyde*, by their marriage articles, dated 24th March 1784, covenanted, that her sixth should become the property of her father; and in April following, it was transferred into his name. *William* the next son, 4th August 1784, transferred his sixth into the name of his father. On the 30th of July 1784, the testator (being then possessed of 32,771*l.* 16*s.* 2*d.* Bank 3*per cents.*) made his will, and (*inter al.*) gave to trustees three sums of 8114*l.* 1*s.* 11*d.* in the same stock, part of the capital therein, in trust for his son *Thomas*, and his daughters *Sarah* and *Charlotte*, and their respective children and grandchildren. The question was, Whether the 1885*l.* 18*s.* which continued to stand in the name of *Sarah* (now *Mrs. Jones*) was her property, or the property

property of her father? As to which a great deal of evidence was read, particularly that of *James* her brother, who swore, that the power of attorney was given for the purpose of a transfer to the father, which had not been made by mistake, but he had received the interest till his father's death, and carried it to his account. On the contrary, evidence was read to shew, that at the time Mrs. *Jones* executed the power of attorney, she was very ill, and scarcely knew what she did, and that she received no consideration for it. Under all these circumstances it was insisted, that Mr. and Mrs. *Jones* must elect between the sum of 1885 *l.* 18 *s.* and the legacy. But Lord Chancellor said, he thought the evidence was not satisfactory to drive Mr. and Mrs. *Jones* to an election. He thought it not sufficient to enable him to pronounce, that the testator did not mean she should have both.

R. S. Byde having issue by a former wife one son, upon marrying a second wife, settled lands on himself and his wife for their lives, remainder to trustees to sell the same to his son, by the former marriage for 5000 *l.* for a provision for the children by the second marriage. Afterwards, having three children, and his wife being enseint, he, by will, gave 1000 *l.* to each of the three children of the second marriage by name, and 1000 *l.* to the child, of which the wife was enseint, and charged his lands with these portions. After his death, the son paid the 1000 *l.* portions, and accepted the purchase, and the wife dying, after her decease, the plaintiff, the only surviving child of the marriage, filed a bill to have the purchase completed, and to be paid the 5000 *l.* over and above his portion under the will. Lord *Northington* thought the testator meant to give each child an election, and that by accepting the legacies, they had made their election to take under the will, and therefore dismissed the bill without costs.

Sir *E. Seymour* and Mr. *Webb*, the paternal and maternal grandfathers of the plaintiff, upon the marriage of the plaintiff's father, entered into articles of agreement, dated *March* 2, 1716, whereby Sir *E. S.* agreed to settle the estates at *B.* on the plaintiff's father, chargeable with the following portions for younger children, namely, 4000 *l.* each for one or two, or 12,000 *l.* equally to be divided between three or more children, payable at 21 or marriage, which should first happen after the death of the father. Besides this, he agreed to advance 1600 *l.* to be laid out in lands as an additional jointure for plaintiff's mother.—Sir *E. S.* died in 1740, whereupon plaintiff's father, the last Duke of *Somerset*, took under the marriage articles; and he also died in 1757, leaving the plaintiff, his eldest son, and the defendants, his widow and younger children. But plaintiff's father by his will made fresh provision for every branch of his family, and bequeathed to his three younger sons 5000 *l.* each, and to his daughters the third part of his *W.* estate, or 8000 *l.* in lieu thereof, with cross bequests between his sons and daughters, in case of any of them dying under age, and charging the whole upon his estates at large, which he devised to the plaintiff, his eldest son, with remainders over to his younger sons, successively in tail male. The plaintiff filed his bill, praying,

Byde v.
Byde, 1 Br.
Ch. Rep.
309. note.

Duke of
Somerset v.
Duchess of
Somerset,
1 Br. Ch.
Rep. 309.
note.

among

among other things, that his younger brothers and sister's husband might elect to take under the articles or will. And the Lord Chancellor directed them to make their election:

Hartop v.
Whitmore,
1 P. Wms.
681.

J. W. by his will (he having at the time of making it four sons and ten daughters) devised considerable real estates to each of his sons, and to every one of his daughters (except *F.* the eldest, to whom he had given a full portion on her marriage, and his daughter *D.*, on whose portion the question arose, and his daughter *D.*, who had disobliged him by turning Roman catholick) he gave the sum of 500 *l.*, if they married with their mother's consent; otherwise, but 300 *l.* a-piece. He then gave his wife the residue of his personal estate in trust for the performance of his will. He then gave his daughter *D.* 300 *l.*, if she should be living at her age of 23 years, and unmarried, or married by and with her said mother's full consent first had and obtained in writing; but if married when it was thereby appointed to be paid her, and that without her mother's full consent as aforesaid, then and in such case he gave her 200 *l.* only, and that to be paid at her age of 23 years; and he appointed *S. W.* his wife sole executrix. It appeared, that at the time of making the will *S. W.* was under her father's displeasure, and then in *London* with a milliner, but upon one *T. T.*'s paying his addresses to her, the father and mother were informed of it by a Mr. *F.* by letter; that they thereupon offered to give 200 *l.* as a portion, and no more; that *T.* for some time refused to marry her without a larger portion, but they were afterwards married without the consent of father or mother. Afterwards, upon *T.*'s applying to the father for *D.*'s portion, the father offered him 200 *l.*, and the mother at that time said, that if she survived her husband, and had it in her power, she would add another 100 *l.* *T.* would not then accept the 200 *l.*, but afterwards wrote a letter to the father for it, who thereupon paid it to *F.* for the use of *T.*, and took a receipt for it from *F.* The testator lived two years afterwards, without revoking or altering his will. *T.* became a bankrupt, and his assignee brought a bill against *S. W.* the executrix, and *T.* and his wife for the legacy of 300 *l.* By Lord Chancellor *Parker*.—If a father gives a daughter a portion by his will, and afterwards gives to the same daughter a portion in marriage, this, by the laws of all other nations as well as of *Great Britain*, is a revocation of the portion given by the will; for it will not be intended, unless proved, that the father designed two portions to one child. And as to his having lived so long after giving the portion to his child on her marriage, without ever revoking that part of his will, there could be no need for the father to revoke that legacy which he before had done by giving the portion in his lifetime, since that would be but revoking the same will twice. And this demand is the harder, inasmuch as it is made by the assignee of the commissioners of bankruptcy against the husband, so that the wife, whose portion this is said to be, would be never the better for it.

J. S. had four daughters, *A.*, *B.*, *C.*, and *D.*, and by his will devised to *A.* 1000 *l.*, and by the same will devised to them 1500 *l.*

Ward v.
Lant, Pr.
Ch. 182.

a-piece for their portions, which several sums of 1500*l.* were to be raised out of a real estate devised by his will for that purpose. *A.* married in the testator's lifetime, and he gave her 4000*l.* portion. By Lord Keeper *Wright*.—This 4000*l.* portion must be taken to be a satisfaction of the 1500*l.* given *A.* by the will for her portion, and a revocation of the will *pro tanto*: but as to the 1000*l.*, that, being a general legacy, *A.* must have that, notwithstanding the 4000*l.* given her for her portion.]

But though the cases on this head have prevailed thus far on the circumstances attending them, and the (a) intention of the testator, yet, as a legacy is a mere gratuity, it is to receive the most favourable construction; and therefore, if it be less than the sum due, payable on a (b) contingency or future day, on these and the like circumstances it will be construed an additional bounty, and not a satisfaction.

(a) That in all these cases the intention of the party ought to be the rule. Salk. 508.

(b) Though the contin-

gency does actually happen, and the legacy thereby becomes due, yet it shall not go in satisfaction of the debt, because a debt which is certain shall not be merged or lost by an uncertain and contingent recompence; for whatever is to be a satisfaction of a debt ought to be so in its creation, and at the very time it is given, which such contingent provision is not. Preced. Chan. 295.

As, if *A.* give a bond to *B.* her servant, to pay her 20*l.* *per ann.* quarterly, for her life, free from taxes; and by will, without taking notice of the bond, gives 20*l.* *per ann.* for her life, payable half-yearly, but not said free of taxes; *B.* shall have both the annuities, for that, by the will, not being so advantageous as the first, cannot be presumed a satisfaction. *cause* the second annuity being payable half-yearly, and charged on land, by which it will be liable to taxes, cannot be so advantageous.

2 Vern. 478. Atkinson v. Webb. Preced. Chan. 236. S. C. and the reasons there given, be-

lie liable to

So, where *A.* on his marriage covenanted to purchase and settle a jointure of 20*l.* *per ann.* on his intended wife, and if he died before such purchase or settlement made, she should have 300*l.* out of his estate for her own use, the marriage was had, and the husband died before any such settlement was made; but by his will he devised to his wife 330*l.* for her life, with power to dispose of 30*l.* part thereof, at her death; it was held, 1. That she had a right to 300*l.* and interest, and that the executor could not now be at liberty to settle 20*l.* *per ann.* as the testator might have done. 2. That she should have the 330*l.* as an additional bounty and provision for the wife.

2 Vern. 505. Perry v. Perry.

[In the marriage settlement of *J. B.* the father, there was a provision of 8000*l.* for younger children, with a proviso that if the father should in his lifetime, or at the time of his death, give to any of his daughters or younger sons so entitled to portions or provisions under that trust, money or lands, for or in advancement in marriage, or otherwise, the value thereof should be deducted from the portion, unless he should by writing declare the contrary. *J. B.* the father, by his will, gave a sum of 4000*l.* in the funds to his wife for life, and after her decease to his second son *J. B.* jun. and also gave him the residue of his personal estate, and made him executor of his will.—It appeared from the Master's report, that the residue was considerably greater than the 8000*l.* charged upon the

Rickman v. Morgan, 1 Br. Ch. Rep. 63. 2 Br. Ch. Rep. 394. S. C.

the

the estate by the settlement. Lord *Thurlow* decreed; that it was a satisfaction of the portion:

Devese v.
Pontet, Nov.
15, 1785,
Finch's Ed.
of Pr. Ch.
240. note.

Felix Devese in 1768, covenanted by marriage articles; that in case *B.*, his then intended wife should survive him; and there should be no issue of the marriage, that his heirs, executors, or administrators, should, within nine months after his death, pay her 800*l.* to be for her own proper use and benefit, and at her own disposal; but in case there should be any child or children born of the said marriage, that the interest thereof should be paid to her for her life, and after her decease that the principal should be paid or divided to and among such child or children, &c. *F. D.* in 1781 made his will; and thereby (*inter al.*) after bequeathing several specifick articles to his wife *B.* directed, that all the debts due to the business which he then carried on should be collected as soon as possible; that the stock in trade and household goods should be valued, and the money that should be in the publick funds, and the produce of all being collected, he desired that it should be divided into equal shares; the one to be the property of his dear beloved wife *B.*, for her to be disposed of as she pleased; the other to be devolved to his dear beloved brother *P. D.* (since deceased), appointing him his heir general. The testator died some time after without issue. A bill being filed by the widow of *P. D.* against the testator's widow, and other necessary parties, the question was, Whether the disposition under the will should be held as a performance or satisfaction of the covenant in the marriage articles? The Master of the Rolls held, that it was not a satisfaction, there being no express evidence, or even a strong presumption, that the testator intended it as such, and it having been repeatedly ruled that an aliquot part of a residue shall not be deemed a satisfaction.

Broughton
v. Errington,
7 Br. P. C.
12.

A., previously to his marriage, covenanted to secure to his wife an annuity of 1000*l.* a-year, issuing out of lands, for her jointure and in bar of dower. He afterwards by his will devised to his wife certain parts of his real and personal estate, of considerable value. It was holden, that she was entitled both to the estates devised, and to her annuity, and that the one was not to be intended to be a satisfaction for the other.

Chaplin v.
Chaplin,
3 P. Wms.
245.

In a settlement, a term was created for raising 10,000*l.* for daughters' portions, with a proviso, that if the father by deed or will should give or leave the sum of 10,000*l.* to his said daughters, it should be a satisfaction. The father leaves lands to the daughters of the value of 10,000*l.* Adjudged to be no satisfaction.

Chancey's
case, 1 P.
Wms. 408.
S. C. by the
name of
Chancey v.
Wootton,
Sel. Caf. Ch.
44. (*a*) So,
Cranmer's
case, 2 Salk.
Fowler v.

A. being indebted to his maid-servant, who lived with him for a considerable time, gave her a bond for 100*l.* as for wages, and afterwards by will gives her 500*l.*, which was mentioned in the will to be for her long and faithful services. The Master of the Rolls observed, that the bond was for service, and the 500*l.* legacy also for service, so that it is a greater reward and satisfaction for the same thing; and so decreed. But he held clearly, that such a legacy is not a satisfaction for service done to the testator after the making of the will (*a*). But this decree was afterwards

afterwards reversed by Lord *King*; for that the testator had by the exprefs words of his will directed, that all his debts and legacies should be paid; and as this bond was then a debt, and the 500*l.* a legacy, it was as strong as if he had directed that both the bond and legacy should be paid: that when the testator gave a bond for the arrears of wages, it was the same thing as paying them; and as, if he had actually paid them, and had afterwards given the legacy of 500*l.*, the executor could not have fetched back the 500*l.*, and made the defendant refund, so neither should the bond in this case be satisfied by the legacy. His Lordship added, that the executor did not himself take this 500*l.* legacy to be a satisfaction of the bond, as appeared by his having voluntarily paid the 100*l.* He therefore decreed the servant both her debt and legacy.

Fowler, 3 P.
Wms. 355.
Thomas v.
Bennet, 2 P.
Wms. 343.

A. on his marriage gave a bond to his wife's trustee in the penalty of 4000*l.*, conditioned, that if he at any time within four months should settle and assure freehold lands of 100*l.* *per annum* on his wife for her life, or if his heirs, executors, or administrators should, within the space of four months after his death, pay unto his said wife 2000*l.*, then the bond should be void. The husband, soon after the marriage, made his will, devising thereby freehold and copyhold lands of 88*l.* *per annum* to his loving wife and her heirs, having surrendered all his copyhold to the use of his will, and died within four months after the marriage. The wife claimed to retain these lands of 88*l.* *per annum*, and as her husband had not settled the 100*l.* *per annum* for her life, she also insisted that she was at liberty to elect the 2000*l.* out of his assets. The Master of the Rolls decreed, that this 88*l.* *per annum* should not be taken in part of the 100*l.* *per annum*; but only as a benevolence: and this decree was, on an appeal, affirmed by Lord Chancellor *King*.

Eastwood v.
Wynke, 2 P.
Wms. 613.

A. had two daughters, *M.* and *N.* A legacy of 100*l.* was left to *M.* by *J. S.*, and another of 50*l.* by *W. R.*, and both legacies were in the father's hands as executor of *J. S.* and *W. R.* Afterwards *A.* by will, by virtue of a power, charges his lands with 2000*l.*, and also left *M.* and *N.* 250*l.* a-piece. Adjudged, that this was not a satisfaction of the legacies.

Meredith v.
Wynn, Pr.
Ch. 314.

R. S. borrowed of his wife 100*l.* which she had saved out of the money allowed her for housekeeping, and by his will gave her a pecuniary legacy of 30*l.*, and also 40*l.* a-year during the life of her mother, and all his household-goods for her life, and gave the residue of his estate to her three sisters. In a cross bill brought by the widow for the 100*l.* and the legacies, the executors insisted, that the legacies and annuity should be looked upon as a satisfaction of the debt. But Lord *Talbot* held, that the 30*l.* could not be a satisfaction, because a less sum; and as to the specifick things devised, and the annuity of 40*l.* a-year, these sorts of devises were never held to be in satisfaction of a debt, unless so expressed in the will; and his Lordship decreed accordingly.

Stanway v.
Styles, 2 Eq.
Ca. Abr.
tit. Devises,
pl. 21.

A father gives legacies to his children, and makes his wife executrix: she not having paid the legacies, by her will gives the

Barkham v.
Dorwine,
Vin. Abr.

tit. Devise
(T. c.), pl.
37.

children legacies likewise; one of which was the same sum, and the other a greater. It was decreed, the children should not have both, and the latter was a satisfaction of the former.

Fowler v.
Fowler, 3 P.
Wms. 353.

Husband, on his marriage, settled 100 *l. per annum* pin-money in trust for his wife, for her separate use, which became in arrear; and then the husband by will gave the wife a legacy of 500 *l.*; after which there was a further arrear of the pin-money; and then the husband died. This legacy being a greater sum than the debt, was decreed, even in the case of a wife, to be a satisfaction of the arrears of the pin-money due before the making of the will, though not of those incurred after the date of the will.

Nicholls v.
Judson,
2 Atk. 300.

W. L., to reward the services of *A.*, who had lived with him a great number of years, gave her a bond in 1728 for payment of 300 *l.* and interest, on a day fixed; and in 1731 paid her 100 *l.*, part of the 300 *l.*, and all interest. In 1736 he made his will, and thereby (*inter al.*) gave to *B.* all his messuages, lands, &c. in *C.*, to hold to him, his executors, &c. for two hundred years, upon trust out of the rents, &c., by mortgage or sale, to levy, raise, and pay to *A.* within two years after his death 200 *l.*, and subject to this term he devised the same premises to the plaintiff and his heirs: he also gave other lands to the same trustee for 300 years, upon trust, to pay 200 *l.* to *A.* within one year after his death. In other parts of his will he gave her plate, linen, &c., and other personal legacies. The executor of *W. L.* paid off some part of the bond to *A.* in her lifetime. A bill was filed against the defendant, her representative, praying, that the legacies bequeathed by the will of *W. L.* to *A.* might be decreed a satisfaction of the bond; and that the defendant might be directed to refund such sums as he had received in part payment of the said bond from the executor of *W. L.* But the Master of the Rolls held these to be contingent legacies, and if the legatee had died before the days of payment, they would have sunk into the land, for the benefit of the plaintiff: and as the rule of ademption had never been carried so far, as to take in a contingent legacy, he decreed for the defendant, that the legacies of 200 *l.* and 200 *l.* were not a satisfaction of the bond.

Graham v.
Graham,
1 Vez. 262.

An annuity of 10 *l. per annum*, charged on a particular estate, was granted by deed to *A.* by her husband's father for 99 years, on condition that she maintained her son: another annuity of 6 *l. per annum* was given her by bond by the same person, during her widowhood: and he gave her a third annuity of 10 *l. per annum* by his will charged generally. The annuity given by the will cannot be considered as a satisfaction for both the other annuities, not being equal to them; nor as a satisfaction for the annuity of 10 *l. per annum*, because out of different funds; the one being out of a particular estate, the other charged on the general fund of real and personal: but it is a satisfaction of the annuity of 6 *l. per annum*, for that is nothing more than a debt upon the testator's estate.

Haynes v.
Mico, 1 Br.
Ch. Rep.

A husband entered into a bond on his marriage to leave to the wife, in case she should survive him, 300 *l.* (which was her fortune), payable

payable in a month after his decease. By will, he gave to his wife 500*l.*, payable within six months after his decease: he gave her also a house in fee, and several other specifick legacies. Lord *Thurlow* held this to be no satisfaction by reason of the different times of payment of the bond and legacy.

G. R. by his marriage articles covenanted to pay to his wife, in case she should survive him, 200*l.* free of all deductions in the name of a jointure, and the sum of 50*l.* to provide herself with a house, yearly during her life, to commence at *Whitsunday* or *Martinmas*, which should first happen after his decease. Afterwards, by his will he directed his debts to be paid, and gave his wife for life the capital messuage at *P. in C.* with the household goods, plate, linen, and china therein; and devised an estate to his eldest son when he should attain 21. Then reciting articles into which he had entered to associate captains of *India* ships, he gave certain directions relative thereto; and then gave all the residue to trustees upon trust to invest the same in stock, and to permit his wife and her assigns to receive 100*l.* *per ann.* during her life. He then gave annuities to his children, sisters, and uncles; and declared, that the several annuities, as well to his wife and children as to his sister and uncles, should be payable half-yearly, and commence from the day of his death. The Master of the Rolls, *Sir R. P. Arden*, thought the provisions in the will were not intended as a satisfaction of the covenant; for if the testator had had the articles in contemplation, it was absurd to suppose, he should give a real estate in satisfaction for half, and an annuity payable and commencing at different times for the other half, provisions so extremely different, without expressing it to be a satisfaction.

Richardson v. Elphinstone, 2 Ves. jun. 463.

Harry Merryweather and *Ann* his wife seized in fee-simple (in the right of *Ann* of a moiety of lands in *H.* and *N.* in the county of *S.*) by indenture, Oct. 4th, 1740, covenanted with trustees to levy a fine to enure to the use of *H. M.* for life, remainder to *A.* for life, remainder to *Rachael Coles* (sister to *A.*) for life, remainder to trustees for a term of 1000 years, remainder to the right heirs of the survivor of *H. M.* and *R. C.* The trusts of the term were to raise 1000*l.* to be paid to such of the relations, &c. of *A.*, and at such times and in such proportions as the survivor of *H. M.* and *R. C.* should by deed or will appoint, and in default of appointment to the next heir or coheirs of *R. C.* The fine was levied: *H. M.* and *A.* both died in the lifetime of *R. C.*, who thereby became entitled to the inheritance of the moiety comprised in the indenture, subject to the term of 1000 years. She was at the same time, and at the time of the execution of the indenture, seized in fee of the other moiety. She died in 1769, having made her will bearing date the 26th Nov. 1756, by which she gave annuities to the father of the plaintiff *Mills*, and to the mother of the defendant *Veale*; and after their decease, sums of 100*l.* to be divided between the children of the annuitants, charged on lands not comprised in the settlement, and an annuity to the mother of the plaintiff *Lit-*

Cantle v. Morris, 1 Br. Ch. Rep. 132. note.

man; and after her decease, a sum of 100*l.* to be divided between the children of the plaintiff *Litman*, charged upon *H.* estate, (one moiety of which was comprised in the indenture); and, having given other legacies charged on *H.*, devised the premises to a trustee for the term of 100 years to raise the same: and she gave all her messuages, &c. whatsoever, in *H.* and *N.* (charged with the payment of the annuities and legacies,) to defendant *Morris* for life, with remainder to trustees to preserve, &c.; remainder to his first and other sons in tail general; remainder to his daughters in tail general; remainder to defendant *Veale*, with like remainders; remainder to *J. Litman*, son of plaintiff *Litman*, in fee. And out of her personal estate the testatrix gave several legacies, and gave the residue to *J. Morris*. She made no other appointment of the 1000*l.* The plaintiffs *Cantle*, *Mills*, and *Elizabeth Litman*, wife of *William Litman*, (father and mother of plaintiff *Litman*, both since deceased,) were her heirs at law, and filed their bill, insisting that they were entitled to have the 1000*l.* raised. The defendant set up three defences: 1st, That *R. C.* having become entitled to the inheritance in fee of the moiety comprised in the term, the term sunk into the inheritance. 2d, That the will operated as an appointment, and the devisees of the estate, being relations of *Ann*, were capable of taking as appointees. 3d, That the legacies and other charges were satisfactions *pro tanto*; and therefore, (if they were wrong upon the other point,) only the residue of the 1000*l.* should be raised. But Lord Chancellor ordered the whole of the 1000*l.* to be raised for the plaintiffs, and, upon appeal to the House of Lords, this decree was affirmed.]

June 12,
1782.

2 Vern. 258.
Duffield and
Smith.

By a marriage settlement, in case of failure of issue male, the remainder of the estate was limited to daughters, until they should raise 3000*l.* for portions: there was issue of the marriage a son and two daughters: the father devised 700*l.* a-piece to the daughters, and died: the son afterwards made his will, and devised to the daughters to the amount of 7000*l.*, without any mention of its being in lieu or satisfaction of any thing due to them, and gave his land to his heirs male, and died without issue. It was held clearly, that the father's legacy could be no satisfaction, not being adequate in value: besides, the father had a son then living, and it was altogether contingent and uncertain whether 3000*l.* would ever arise and become payable or not; and therefore it was but reasonable that the father should make some certain provision for his daughters: but as to the son's legacy of 7000*l.* it was by two lords commissioners, against *Rawlinson*, decreed a satisfaction; but upon an appeal to the lords the decree was reversed, for the daughters being heirs at law, and disinherited, there was no ground for the court to make a strained construction to their prejudice, in favour of a voluntary devisee.

Salk. 155.
pl. 5.
Cuthbert v.
Peacock.

2 Vern. 593.
S. C.

H. owed to his niece *A.* 100*l.* by bond, and having two other nieces, *B.* and *C.*, makes his will, and bequeaths 300*l.* to his niece *A.*, and to his two other nieces 200*l.* a-piece: after that he borrowed another 100*l.* of his niece *A.*, and died, being indebted to her

her in 200*l.* To prove that the 300*l.* should go in satisfaction of the debt, it was insisted on as a rule in equity, that where a testator, being indebted, gives his debtee a legacy greater than his debt, it shall go in satisfaction; for a man shall be intended to be just before he is kind: otherwise, where a legacy is less, for that is neither to be just nor kind, and shall not be taken to go in satisfaction of any part. But *per Cowper*, Lord Chancellor, it might be as good equity to construe him to be both just and kind, if he intended to be both; if any part of this 300*l.* be applied to the payment of the debt, as for so much it is not a gift; whereas a legacy must be taken to be a gift or gratuity: and there being assets, and some (a) proofs of the testator's greater kindness to A. than his other nieces, his Lordship decreed her the whole 300*l.* over and above her debt.

(a) But whether any parol evidence ought to be admitted in those cases, see tit. Evidence. See also *Shudal v. Jekyll*, 2 Atk. 517. & *infra*. Preced. Chan. 514.

If a legacy of 100*l.* is given to A. by J. S., and another of 50*l.* by J. D., and of both wills A.'s father is made executor, who having by a marriage settlement power to charge his land with 2000*l.* for portions, devises 1000*l.* equally between his daughters; by devising it to them equally, according to the marriage settlement, he shews that he intended them an equal benefit, and therefore the 1000*l.* shall not be in satisfaction of the legacies given A.

A. indebted to B. in 50*l.* left him a legacy of 500*l.* and made him executor, and after the making of his will, borrowed 150*l.* more of him; and the Master of the Rolls held, that the legacy should be a satisfaction of both debts: but *Harcourt*, Lord Chancellor, reversed his decree, and held, that a court of equity ought not to hinder a man from disposing of his own as he pleases; and when he says he gives a legacy, it cannot contradict him, and say he pays a debt: and it was also held in those cases, if a legacy be less, it shall not be a satisfaction. So, if the thing given be of a different nature, as land, it shall not go in satisfaction of money. So, if the legacy be upon condition, for by the breach he may be a loser, whereas the will intended it for his benefit.

2 Salk. 508. pl. 4. *Cranmer's case*.

A., by will, gave six several annuities for lives, three of 10*l.* each, and three of 5*l.* each, to be paid out of his personal estate, and gave all the rest of his real and personal estate to E. his wife, whom he made sole executrix: the annuitants were his sisters and their children; and about two years after the wife makes her will, and gives two annuities of 5*l.* each to two of the 5*l.* a-year annuitants in her husband's will, but gives them to them and their heirs, in case they happen to overlive such a one, who by her husband's will had 10*l.* *per ann.* for life; she likewise gives another annuity of 10*l.* *per ann.* to one and her heirs, and another of 5*l.* to another and her heirs, who had each of them the like annuities for life by the husband's will; but in the disposition of these annuities she takes no manner of notice of her husband's will, or that they had any annuities thereby given them; and the only question was, Whether the four annuities given to the persons in fee, by the wife's will, should be taken to be only in satisfaction of the like annuities for life, given to the same persons by the husband's will? and it was argued that they should, because the

Trin. 1729, *Crompton v. Sale*, 2 P. Wms. S. C.

husband's annuities being payable only out of his personal estate, and the wife being his executrix, she was in the nature of a debtor for them; and wherever a person, by his will, gives a legacy as great or greater than the debt he owes to the legatee, it has always been taken to be a satisfaction of the debt. But *per* Lord Chancellor, this doctrine has already been carried too far, and he would never carry it farther; for though it is true, a man ought to be just before he is bountiful, and therefore shall be presumed to pay a debt rather than give a legacy to the same person, when it is the same sum, or more, than he owes him; yet why may he not be both just and bountiful when there are assets to answer both, as in the present case; and there can be no pretence to say that the two first annuities of 5 *l.* can be a satisfaction of the like annuities given by the husband, because they are given upon the contingency of overliving such a one, which has not yet happened, and possibly never may; and then shall the annuities for life, which are certain, be extinguished by giving the same persons annuities in fee on a contingency which may never happen? And if that were so, as to these annuities, there is no reason to imagine the wife had a different intention as to the others, or that she intended two of them should go in satisfaction of the like annuities given by her husband, and the other two not: and the cases where a legacy has been held a satisfaction of a debt, are, where the debt was owing by the same person who gave the legacy: but if such legacy be given on a contingency, or to take place at a future day, it is no satisfaction of the debt; and therefore in the principal case it was decreed, that the annuities given by the wife were distinct additional annuities, and not an enlargement only of the husband's annuities from an interest for life to an interest in fee, and that the annuitants should take both.

Bellasis v.
Uthwait,
1 Atk. 426.

[*J. S.*, on his marriage, made a settlement of some exchequer annuities for 99 years, to the amount of 300 *l. per ann.* in trust for himself for life, remainder to his wife for life, remainder to his children, in such manner as he should appoint, and if no children, to his executors, administrators, and assigns. By this marriage there was only one child, *B.* *J. S.* being likewise seised of a considerable real and personal estate, afterwards devised all his real and personal estate to his wife and her heirs, charged with the payment of 10,000 *l.* as a portion for his daughter, payable at the age of 18 years; and in case his wife should marry again, that then the estate should stand charged with a further sum of 5000 *l.* for his daughter. One point in the cause was, whether the 10,000 *l.* bequeathed by the father to *B.* should be taken to be in satisfaction of the annuities under the settlement, and so the annuities be considered as part of the father's personal estate which he had a right to dispose of by his will? And Lord *Hardwicke* was of opinion, that it could not be taken to be in satisfaction, but that *B.* was entitled to both as a double portion: for though the annuities and the legacy are both of the same nature, both personal estates; yet the legacy of 10,000 *l.* is subject to a contingency, and not payable, unless *B.* survived the age of 18 years: besides, *B.* might have

have lived till the annuities were run out, as several of the years were already gone; and as the legacy might never have become payable, it would be hard to say, that a mere contingency should take away a portion absolutely vested, especially in the case of an only child. If indeed the father had disposed of these annuities to any other person, it might have been a question, his Lordship added, whether the 10,000 *l.* should not be taken to be in satisfaction, and whether, upon those circumstances, *B.* ought to be allowed to insist upon both demands?

A freeman of *London*, having a wife and six children, by his will gives his wife her widow's chamber, and the third of his estate, which she was entitled to by the custom of *London*; and to his six children one other third which they were entitled to by the custom; and as to the third which he had a power to dispose of, he directed a debt of 100 *l.* to be paid out of it, and the residue to be equally divided between his wife and children. After making his will he married one of his daughters to the plaintiff, and gave her 1000 *l.*, which in the marriage articles was called her portion or provision. On the death of the testator, a bill was brought by the husband and wife, for their seventh part of their testamentary third. For the defendants, the other children, it was insisted, that the portion was a satisfaction for the whole, and that as the plaintiffs did not offer to bring the 1000 *l.* into hotchpot, to make all the children equal, they ought not to claim this 1000 *l.* (which was more than their testamentary third, the whole estate being only 10,500 *l.*) and the share of the testamentary part too, by which they would have 290 *l.* more than the other children; that the will intended an equality among all the children, and as they refused to bring in this 1000 *l.*, they claimed under the will as far as it makes for them, and against the will, when it makes against them, which equity would not permit. But Lord *Hardwicke* said, that though it be true, that where a father, after making his will, advances his child with a portion as great or greater than the legacy given by the will, such provision has been always holden an ademption; yet, there was no case where the devise has been of a residue (that is uncertain, and at the time of the testator's death may be more or less,) in which a subsequent portion given has been held to be an ademption; that this was not a devise of one third, but of a residue after payment of a debt charged on that third: that here was likewise something to which this portion might be properly applied as a satisfaction, *viz.* the orphanage part; and the testator calls this a portion or provision in the marriage articles, which seems as if he then considered this as an advancement in his lifetime in bar of the custom: that there was no declaration in the will, that he intended all equal; but what he has said of equality is of the residue, which is a part of the estate remaining after what was given away in the testator's lifetime. His Lordship decreed accordingly.

J. S. by a codicil, without any date, gives 1000 *l.* a-piece to *M.* and *S.*, (the daughters of *Mrs. R.* a widow, with whom he lived for several years till the time of his death,) and if either of them

Farnham v.
Phillips,
2 Atk. 215.

Spinks v.
Robins,
2 Atk. 491.

should die before their legacies were paid, then he gave the whole to the survivor, and directed that each of the said legacies should remain in the hands of his executors, till the legatees attained the age of 21. He afterwards enters into two bonds, one to *M.* and the other to *S.*, reciting, that for divers good causes and considerations, he is desirous of making a provision for and towards their maintenance. Each of the bonds was in the penalty of 4000 *l.* for securing 2000 *l.* a-piece to them, provided they should marry in his lifetime, with his consent, or in case they should survive him. It was insisted, that the bonds were to be considered as given in satisfaction of the legacies under the will : but Lord *Hardwicke* held, that they were not ; for that he did not remember in any case between strangers, where a man first gives a legacy by will, and afterwards a different sum to the same person by bond, that the one has been held to be in satisfaction of the other ; that in this case it weighed with him very strongly, that the money given by the bond was upon a contingency, and therefore wholly uncertain whether one shilling of the principal sum would become due or not ; and that in the construction upon double portions, it had always been of weight, that they were both certain.

Shudal v.
Jekyll,
2 Atk. 516.

A bill was brought against the executors of Sir *Joseph Jekyll* for a legacy of 1000 *l.* ; Sir *J.*'s will was dated the 4th of *May* 1738 : soon afterwards Mr. *S.*, the plaintiff's late husband, made his addresses to her, and applied in *July* following to Sir *J.*, who was her uncle, for his approbation ; who, being satisfied with the match, said, he would give him 500 *l.*, but as it was not convenient to let him have the money, he would draw a note payable to him on 25th of *March* 1739, and lodge it in Mr. *Hill*'s hands, to be delivered to Mr. *S.* after the marriage was had, (which he did accordingly) ; and also said, that he would leave something to his niece by will, but that he would not be put under any obligation of doing it. Upon the 19th of *August* 1738, Sir *J.* died without revoking his will, and the very next day the plaintiff and Mr. *S.* were married. The question was, Whether the legacy under the will was satisfied by the 500 *l.* given in the testator's lifetime ? Lord *Hardwicke* decreed, that it was not : that there was nothing done by Sir *J. J.* afterwards in his lifetime that induced a presumption of satisfaction ; and farther, that even if a father had given his daughter a portion in his lifetime, and accompanied it with such declarations as used by the testator in this case, a portion so given would not have been an ademption of the legacy ; *a fortiori* in this case, it could not, where the testator was only a remote collateral relation, the plaintiff's great-uncle, and did not even stand *in loco parentis*, for the plaintiff's father was living.

Wood v.
Briant,
2 Atk. 521.

The plaintiff's wife was entitled to the residue of her grandmother's estate, under her will, and likewise was left executrix, &c. *durante minori etate*, her father was administrator. At the time of her marriage with the plaintiff, he was, by agreement, to have 800 *l.* from the father, which in the settlement was mentioned to be for a portion, and in consideration of natural love and affection. It was insisted for the plaintiff, that he is entitled to

an account of the grandmother's estate from the representative of the wife's father, and that the 800*l.* paid by her father, upon her marriage, was not in satisfaction of this residue, especially as it is expressed to be given for natural love and affection: and as the father, at the time of the marriage, was worth at least 8000*l.* and had only this daughter and one son, the counsel argued, it was not probable he meant it as a satisfaction; that constructive satisfactions must be drawn from circumstances; that there is no case to be produced, where a father is indebted to a child on account of a demand under the will of a collateral relation, and that before the demand is liquidated, his giving a sum as a portion to this child, has been held a satisfaction: and for this purpose were cited *Chidley v. Lee*, *Pr. Ch.* 228., and *Barnham v. Phillips* (*supra*), before Lord Hardwicke in 1741.—The counsel for the defendant rested chiefly upon the parol declarations of the plaintiff and his wife, soon after the marriage, that the 800*l.* was intended both as a portion and a satisfaction likewise as to the residue of the grandmother's estate; and the depositions of six or seven witnesses were read, which were very full to this point. To encounter this, on the plaintiff's side, was read the evidence of the father's declarations before and after the marriage; that he said his mother had left 500*l.* at least to his daughter; and that he would give *John Wood* (the plaintiff) 1000*l.* and make a man of him; and not above six weeks before his death, said to the plaintiff, "Thou knowest I owe thee a great deal of money, and "thou shalt not be wronged of a farthing." Lord Hardwicke refused to decree an account of the grandmother's personal estate, she having been dead twenty years, and there being no grounds to think that the residue under her will was more than the fortune given to the plaintiff's wife in marriage, it being admitted, that 500*l.* was the utmost amount of it.

In the case of *Chidley v. Lee*, the facts were these, viz. Mr. L. was father to the plaintiff's wife, and had in his hands a legacy of 150*l.* which had been given him by a collateral ancestor. On her marriage with the plaintiff, the defendant, her father, gave her 1000*l.* portion, and

after settled a church lease on the plaintiffs, and maintained them 14 or 15 years at his own house, and no notice was ever taken of the legacy, nor, for aught appeared, did the husband know any thing of it; yet, after some difference between them, and a bill brought, the legacy was decreed with interest and costs; and the Master of the Rolls said, he could not discharge it, though he disliked the suit.—Lord Hardwicke, in speaking of this case, says, the ground Sir John Trevor went upon was, that the husband knew nothing of the legacy to the wife from the collateral ancestor, and therefore held it was not satisfied by the portion, though it was a much larger sum than the legacy: but his Lordship added, he thought this an extremely hard case, and he believed he should have been inclined to determine it otherwise. 2 Atk. 523.

On a bill by the plaintiff, as administrator to his wife, one of the daughters of *W. Bradford*, which daughter was entitled to a fifth part of a legacy of 520*l.*, left to her and her four sisters by the will of *T. Tindall* their grandfather; the case was as follows, viz. *Tindall* made the wife of *Bradford* executrix. *Bradford*, as her husband, possessed himself of the personal estate of *Tindall*; mixed the effects with his own; applied them to his own business; and continued so till his death. Upon a treaty for the marriage of the plaintiff in 1740, with one of his daughters, *Bradford* agreed to give 400*l.* as a marriage portion, as it was sworn by the plaintiff's father, one of the parties to the agreement. On the wedding day, *Bradford* went up and fetched the 400*l.* which was put by

Seed v. Bradford, 1 Vez. 501.

for

for the husband's use; one witness swearing, that *Bradford* said, "there is the money, but that is not all;" another, that he said, "there is what I give my daughter, but that is not all;" and both added, "or words to that effect." It appeared, that the daughter was privy to the right she had to this fifth part. It did not appear (but rather the contrary) that her husband knew of it at that time; but he knew of it a year after the marriage, yet never made any demand of it in the life of his wife, who died in 1742, nor in the life of *Bradford*, who died in 1746. The court, principally upon the ground of the long acquiescence by the plaintiff, decreed the 400*l.* to be an implied satisfaction of the 104*l.*, the fifth part of the legacy of 520*l.*

Mackdowell
v. Halfpen-
ny, 2 Vern.
484.

A. devised his real and personal estate to *B.* his son, charged with 500*l.* to *B.*'s daughter, payable at 21 or marriage. *B.* married this daughter to *C.* her first husband, after the testator's death, and gave her 1500*l.* as a portion, but no mention was made of the 500*l.* legacy, nor was any release or discharge taken for it. Twenty-one years afterwards, the daughter and her second husband, brought their bill against the father for the 500*l.* legacy. But the bill was dismissed, it being to be presumed, that the 1500*l.* portion was intended in satisfaction of the legacy, especially after such a length of time.

Clerk v.
Sewell,
3 Atk. 96.

E. G. by his will gives a legacy of 2000*l.* to trustees, in trust to pay the interest thereof, to his wife for life; and after her death the benefit of the principal to his son; but if he dies before 21, then he gives it over to his daughters, and makes *J. S.* and two more persons executors. The son attained 21, and became entitled to the 2000*l.* The directions in the will were, that the executors should carry on the testator's trade of a brewer; and in compliance with this, they suffered the 2000*l.* as well as the rest of the testator's estate to continue in the trade. The son, after he had attained his age of 21, still carried on the trade on the foot of the same stock which was left by his father. The son afterwards makes his will without any reference at all to his father's, and gives a legacy of 10,000*l.* upon different trusts from what his father had done of the 2000*l.*; for after the interest of the 10,000*l.* to his mother for life, he gives the principal to his sister *S.*'s children, and charges it upon all his real and personal estate, and to be paid to trustees *in a month after his death.* Upon the death of the son, the plaintiff, as devisee of the mother, insisted both on the interest of the 2000*l.* and the interest of the 10,000*l.* Lord *Hardwicke* held him entitled to both; that in the case of portions, it is true, the court always leans against incumbering estates twice over; and will overlook little circumstances of time; as to the payment of two sums to children, if it appears to be a double portion and a double provision for younger children; but that this has never been the rule in regard to debts, where the funds for payment are appointed by different persons: that the interest of the 2000*l.* was part of the provision and livelihood of the mother, and a debt upon the estate of the father in the hands of the son: that the mother might have lived till within a day of the time which was

to be the commencement of the payment of the interest of the 10,000 *l.* to her, and yet not have been entitled to it, and therefore it could be no satisfaction; for there is no case to make a legacy a satisfaction of a debt, when the legacy is not due at the time of the testator's death, but is made contingent, and to take place at a future day.

J. B. being by the will of *J. P.*, to whom he was executor, to pay 300 *l.* to his aunt *M. P.*, devises the residue of his estate to his mother and his aunt *M. P.* for life. It was adjudged, that this devise of the moiety of the residue for life was not a satisfaction of the annuity; for it is a general rule of satisfactions, that the thing given in satisfaction should be exactly of the same nature, and equally certain; but that here it was neither: the first being a clear annuity of 300 *l.*, the last being the moiety of the residue of the personal estate, whether more or less: that when a legacy has been presumed a satisfaction, it has been for a debt by the same testator.

A son was entitled under the marriage articles of his mother to have 1500 *l.* laid out in land to his sole benefit after the death of his father and mother. The mother died; the father by a second marriage had a daughter, and having made a provision for her by a settlement, he, by his will, devised other parts of his estate to his daughter and her heirs, and the residue in trust for his son for life, and then to the daughter, with particular limitations and declarations of that trust; and all his personal estate, except such as was given to the daughter, he gave to the same trustees to pay all just debts and legacies, and then to his son for life, with a bequest over to the daughter and her family. It was insisted, that this devise to the son was a satisfaction for the 1500 *l.* But Lord Chancellor said, there was no authority that such a bequest as this of the residue of real and personal estate, after payment of just debts, to testator's eldest son and heir for life only, should be construed a satisfaction for the 1500 *l.* he was entitled to under his mother's marriage articles. If the son died in the lifetime of the father, leaving several children, there was no provision for them. So, if he survived, as he did, and had issue afterwards: the 1500 *l.* therefore must be considered as a debt by specialty on the testator's estate, to be retained by the defendant his son.

Mr. *Pelham*, having four daughters, by his will appointed a sum of 10,000 *l.*, over which he had a power under his marriage settlement among his daughters, excepting Lady *Lincoln* (whom he had advanced); he then directed his *Nottinghamshire* estate to be sold after the death of the Duke of *Newcastle*, and the money to be divided among all his daughters, excepting Lady *Lincoln*; and also gave his personal estate among his daughters, excepting Lady *Lincoln*, and the residue of his real estate to all the daughters without any exception. By a codicil he charged his estate at *Esber* with 5000 *l.* to each of his younger daughters who should not be entitled to the house and park at *Esber*. His daughter *Grace* afterwards married Mr. *Watson*; and Mr. *Pelham* gave her 20,000 *l.*, by applying part of the 10,000 *l.* and other means, for her fortune: and

Barret v.
Beckford,
1 *Vez.* 519.

Alleyne v.
Alleyne,
2 *Vez.* 37.

Watson v.
Earl of Lin-
coln, Amb.
325. 1 *Br.*
Ch. Rep.
66. note,
S. C.

the question was, Whether the legacy given by the will was satisfied by the portion? Lord *Hardwicke* held, that the 20,000 *l.* advanced to *Grace* in Mr. *Pelham's* lifetime, which by her marriage settlement was recited to be in full of her portion or fortune, was a satisfaction of what she could claim under the will or settlement of her father by way of portion; but as to the devise of the one-third of the personal estate, and the fourth of the residue of the real estate, his Lordship thought it was no satisfaction.

Jescock v.
Falkener,
1 Br. Ch.
Rep. 295.

T. C. entered into a bond to trustees, reciting, that he was desirous of providing for one of the defendants *T. C.* his natural son, then about four years old, and conditioned that his executors should, six months after his decease, pay the sum of 5000 *l.* to the trustees for the use of the said *T. C.*, the interest to be applied for his maintenance and education till 21, and the principal then to be paid him; but if he should die, living the father, or under 21, then not to be paid.—*T. C.* afterwards made his will, whereby he gave the defendants, the trustees, all his estates in trust to pay legacies, and to lay out 15,000 *l.* upon securities, and to apply 200 *l.* *per ann.* to the education of his natural son *T. C.*, till 25; and then to pay to him the 15,000 *l.*; but if he should marry between 22 and 25, and should die, to pay the whole to his issue; and if he should die unmarried before 25, the whole over. Lord *Thurlow* decreed, that the bond was not satisfied by the legacy; and his Lordship's decree was affirmed by the Lords Commissioners *Laughborough*, *Asheurst*, and *Hotham*.

Grave v.
Earl of
Salisbury,
1 Br. Ch.
Rep. 425.

The Earl of *Salisbury* left a legacy of 10,000 *l.* to *James Cecil Grave*, suggested, but not proved to be his natural son. The bill was filed to establish the will, and for an account of the personal estate; but the defendant's answer stating that the testator had in his lifetime advanced money to *J. C. Grave*, which it was insisted ought to be taken in satisfaction *pro tanto* of his legacy, the Lord Chancellor referred it to the Master to inquire into the circumstances of such advancements, and to report them to the court. The Master found, that the testator had granted to *J. C. Grave*, a lease for 99 years of a farm called *T.*, at the rent of 40 *l.* a-year, which farm he found had before been let at 142 *l.*, and was reported to be worth to be let at 180 *l.* *per ann.* He calculated the difference between the reserved rent and the real value, at 20 years purchase, to be 2800 *l.*; and also found that the testator had paid the former tenant of the premises 1200 *l.* for a standing crop, dead stock, and farming utensils, and also 400 *l.* for repairs; making together the sum of 4400 *l.* The question was, Whether this sum of 4400 *l.* should be considered as a satisfaction for so much of the legacy of 10,000 *l.*? Lord *Thurlow* was of opinion it was not to be so considered, and ordered the legacy to be paid.

Holmes v.
Holmes,
1 Br. Ch.
Rep. 555.

Holmes the father, who was a jeweller, by his will gave his son 500 *l.*, and 2000 *l.* to four unmarried daughters; then gave his son the utensils of his trade, (which were of trifling value); and gave the residue of his personal estate to his wife for life; and after her death, he gave further legacies to his daughters; to some 500 *l.*, and to others 1000 *l.*, and if any surplus, to be divided between
all

all his children who should be then living, (there being then seven in all). He afterwards took his son into partnership with him, and by the deed of partnership, the stock was to be 3000*l.* to be brought in equally; and they were to be equally entitled to the whole. The father brought in the whole capital, and it was understood by the whole family, that he meant to give the son the half of the stock. The children, who were of age, by their answer admitted this; and there was parol evidence of declarations of the testator at different times, that he meant to bring his son into partnership, and to give him half the stock, and even the whole; and that he told one witness, that he had brought his son in, and had given him 1500*l.* The question was, Whether this advancement was a satisfaction of the legacy of 500*l.*? and it was held not to be a satisfaction, not being *ejusdem generis*; and that it must have been the testator's intention, that the son should have both.

A testator bequeathed to his putative daughter in the following terms, *viz.* "I bequeath the mortgage bond 1365*l.* due to me from "Mrs. M., to Miss *Kitty Meredith*, now in my house, in order to "fit her out for *India*, or to dispose of her in marriage." Miss *Meredith*, during the testator's life, married *More* the bankrupt, and the testator gave *More* a bond for 1000*l.* as a marriage portion. He also gave them after marriage 600*l.* to buy furniture, &c. The bond was afterwards paid; 400*l.* of it being retained by *More* out of money received on account of the testator, and the remaining 600*l.* upon suit by the assignees. *More*, the bankrupt's father, being examined as a witness, said, that the testator, before the marriage, told him, in a conversation on the subject, that "he could only give her 1000*l.* on her marriage, but there "would be more hereafter, as his life was a bad one;" by which he understood she would have a farther fortune at the testator's death. Lord *Thurlow* held, that the sum of 1000*l.* advanced upon the marriage was not an ademption of the legacy; nor was there any evidence or presumption, that the gift of 600*l.* after the marriage was an execution of the testamentary gift.

A testator bequeathed to a young lady, to whom he was not related, the sum of 6000*l.*, payable in three months after his decease. After the making of the will, the lady married a clergyman, which marriage was had with the approbation of the testator, who gave 5250*l.*, 5000*l.* of which was stated in the settlement to be her marriage portion. After the marriage, the testator laid out 800*l.* in the purchase of a chaplainship of *Chelsea Hospital* for the husband. It was insisted, that these sums making together 6050*l.* were instead and lieu of the legacy of 6000*l.* But Lord *Thurlow* held, that where a stranger gives a legacy by will, and afterwards gives a sum, without any evidence that it is intended for the same purpose, it is not taken as a satisfaction; that to make it so, it must appear, at the time of the gift, to be meant as an ademption of the legacy; and nothing of that kind appearing here, he decreed the legacy not to be adeemed.

H. and *F.* the daughters of *J. S.* were entitled under his marriage settlement to 2000*l.* charged upon his estate. *J. S.*, by codicil

Debeze v.
Mann, 2 Br.
Ch. Rep.
165. 519.

Powell v.
Cleaver,
2 Br. Ch.
Rep. 499.

Hanbury v.
Hanbury,
2 Br. Ch.
Rep. 252.

codicil to his will, gave the sum of 20,000*l.* to be equally divided between *H.* and *F.*, to be paid down, or sufficient security given for the payment thereof within thirty days of either of them being married, provided the person to whom she should be married should settle on her a jointure of 500*l.* *per ann.*, otherwise she should be entitled but to 5000*l.* &c. This was adjudged to be a cumulative provision, and not a satisfaction of the 2000*l.* provided for the daughters by the settlement.

Baugh v.
Reed, 3 Br.
Ch. Rep.
192.

A testator being possessed of 32,771*l.* 16*s.* 2*d.* Bank 3*per cents.*, devised to trustees three sums of 8114*l.* 1*s.* 11*d.* in the said stock, part of the said capital therein, in trust for his son *T.* and his daughters *S.* and *C.* and their respective children and grandchildren. After the making of the will, (the testator being then possessed of 34,657*l.* 14*s.* 2*d.* Bank 3*per cents.*) *C.* intermarried with the plaintiff, and by their marriage settlement, the plaintiff, in consideration of 5000*l.* in Bank 3*per cent.* consolidated annuities, which were to be accepted by him as the portion of *C.* his wife, and in satisfaction of his contingent right to a legacy given her by her grandfather's will, covenanted, within one month after she should attain her age of 23 years, to release her share of the said legacy to her father. Lord *Thurlow* held, that this portion could not be considered either an ademption or satisfaction of the legacy given to *C.* by her father's will.

Ackworth
v. Ack-
worth, 1 Br.
Ch. Rep.
307. note.

Before marriage, a sum of money, partly belonging to the husband, partly to the wife, was settled to the use of the husband for life, remainder to the wife for life, remainder to the children to be equally divided between them. There were several children, and the money amounted to only 2400*l.* among them. The father afterwards made his will, and gave each of the children 2000*l.*, and the residue of his estate among them. Lord *Bathurst* decreed, that what they took by the will should be in lieu of their portions under the settlement.

Warren v.
Warren,
1 Br. Ch.
Rep. 305.

J. W. the plaintiff's father, by his marriage settlement, conveyed his estate to trustees to the use of himself for life, remainder to trustees to preserve, &c., remainder to his wife for life, remainder to trustees for a term to raise 10,000*l.* for younger children, remainder to his eldest son in tail, remainder over, &c. In the settlement was a power reserved to him to raise money, but subject to the wife's life estate, and the provision for the children; and also a proviso, that in case he should in his lifetime give to any of his younger children any sums of money towards his or their portions and advancement, and declare the same by writing to be in part of his or their portions, they should go *pro tanto* in satisfaction thereof. By his will, reciting that he had made no provision for his wife by settlement or otherwise, he declared it to be his will that the trustees should pay her 600*l.* *per ann.* for life in bar of dower; and if he should have but one younger child only, they should raise 5000*l.* for such one child, if more, 2000*l.* each, which he charged on his personal estate, and in default thereof, upon the settled estate. He died leaving the plaintiff his eldest son, and two of the defendants, his younger children.

children. It was decreed, that this provision by the will was in part satisfaction of the portion by the settlement, and that upon payment of 5000 *l.* each, the surviving trustee in the settlement should assign the term.

Testator by will, 7th *March* 1774, devised to his eldest son *Isaac Cookson* certain freehold and copyhold estates, and continued as follows, "As to all my other lands, goods, and chattels, of what nature or sort soever, I give to my dear wife *Elizabeth*, appointing her executrix of this my last will, with the tuition and education of all and every such younger children, and to provide for them, with regard to their fortunes, as they may deserve and merit." To the will he added a paper of the same date, called *Instructions to my wife with regard to my younger children*; wherein, after directing fortunes for his younger sons, he says, "My daughters *Hannah* (the plaintiff) and *Sarah* to have 5000 *l.* each; all the surplusses over and above your own expences to be laid out in mortgages or purchases for the purposes before mentioned." By an additional codicil on the same paper, and of the same date, he says, "I do further add to what I have said on the other side, that what savings or increase I may make, or my dear wife may make of my effects, she may give and dispose of the same, either in her lifetime, or by will, to such of her children as she sees proper." The testator died in *December* 1783, without revoking the said will and codicil, which were proved by the defendant, the widow, in the ecclesiastical court.

Ellison v. Cookson,
2 Br. Ch.
Rep. 307.
3 Br. Ch.
Rep. 61.

After the date of the will, viz. about *September* 1776, a treaty of marriage being on foot between the plaintiff *Richard Ellison* and the co-plaintiff his wife, Mr. *Busb*, brother-in-law to Mr. *Ellison*, was desired by Mr. *Ellison* senior, the father of the plaintiff, to go to Mr. *Cookson*, the co-plaintiff's father, to acquaint him with the provision intended by Mr. *Ellison* senior for his son, and to learn from Mr. *Cookson* what he meant to give his daughter; when Mr. *Cookson* informed Mr. *Busb* (as he swore in evidence), that he meant to give his daughter *Hannah* (the co-plaintiff) 5000 *l.* upon her marriage, and intended to give her a further sum, equal or nearly equal thereto, upon his death; but refused to settle or specify the sums. In the course of the treaty between Mr. *Busb* and Mr. *Cookson*, several letters passed; and in one of them from Mr. *Busb* to Mr. *Cookson*, dated 5th of *October* 1776, Mr. *Busb* says, "Mr. *Ellison* (the father) says—as he hopes the provision you told me and Mr. *Richard Ellison* you intended making for Miss *Cookson* at your decease, WILL BE equal, or nearly so, to what you propose giving upon the marriage, he shall rest perfectly satisfied with your word for fulfilling that engagement." In answer to this letter the testator wrote to Mr. *Busb*, and in the letter said, "You must mistake Mr. *Ellison* in regard to any such declaration as you mention; the mistake may arise between what may be possible and probable: I told him my present plan, which would be executed by my wife, if the longer liver."

In

In February 1777, the plaintiffs intermarried; and, on the 14th of that month, the plaintiff *Richard* received from Mr. *Cookson* the sum of 5000 *l.*, and gave a receipt for the same as for his wife's portion. The Master of the Rolls, Sir *L. Kenyon*, thought there was not sufficient to repel the general presumption in such a case as this, that the portion was a performance of the legacy; and Lord *Thurlow* was afterwards of the same opinion.

Richardson
v. Greefe,
3 Atk. 65.

A. by her will says, "*Item*, I give to my servant *Jane Greefe* 500 *l.*, to be paid her within three months after my decease." In another part she says, "I give 5 *l.* a-piece to the rest of my servants, but I do not give 5 *l.* to the said *Jane Greefe*, because I have done very well for her before." By another clause she gives her lands lying in different parishes, in trust, by mortgage, sale, or otherwise, to pay her debts and legacies; and after her debts and legacies paid, then, &c. The testatrix was at her death indebted to *Jane Greefe* in 260 *l.* on bond. Lord Chancellor held, that the legacy was not a satisfaction of the debt; for the words, "*because I have done very well for her before*," shew, that what she had given her before she intended as a bounty, and not as a satisfaction; and they likewise intimate, that the testator meant the 500 *l.* to be equally a reward for the services of *Jane Greefe*, as the 5 *l.* was for those of the other servants; and legacies to servants have never been held to be in satisfaction of debts. The argument too, that the legacy was not to be paid within three months after the death of the testatrix, was not to be laid entirely out of the case: though, if it had been charged upon real estate only, and not at all chargeable upon the personal estate, his Lordship said, he should have thought it of greater weight; for the possibility and contingency of the legatee's dying before the legacy became payable, must be taken into consideration, as the legacy might not have been paid at all, if the legatee had died before the three months. But where the legacy is charged upon a mixed fund of personal and real estate, if the personal assets are sufficient, the legacy is payable, though the legatee die before the day of payment: otherwise, if the legacy be out of a real estate only.

Gaynon v.
Wood, July
19, 1759,
1 Cox's P.
Wms. 410.
note.

Where a testator by will gave to *Sarah Gaynon* a legacy of 500 *l.*, and thereby declared, that in case his personal estate should not be sufficient to pay *all his debts, legacies, and funeral charges*, he thereby subjected all his real estates to the payment thereof; and afterwards by a codicil gave a further legacy of 500 *l.* to the said *S. G.*, and died indebted to *S. G.* in 200 *l.* on bond, which debt was contracted after making the will, but before the codicil: the Master of the Rolls declared, that the 500 *l.* given by the codicil, was to be considered and deemed a satisfaction of the said 200 *l.* owing by the testator to the plaintiff *Sarah*.

Mathews v.
Mathews,
2 Vez. 635.

Admiral *Mathews* had upon his marriage a real estate of 300 *l.* *per annum* in strict settlement, so as to make his eldest son tenant in tail. Long afterwards, in 1773, he enters into a deed, which was an agreement between the father and son upon the son's marriage, whereby the father agreed to take 200 *l.*, part of the fortune

of

of the son's wife, and to make a settlement in this way; that in consideration of the 800 *l.* he should in one month afterwards convey to trustees for a term of years, lands, subject to these trusts, to secure 50 *l. per annum* to the son, and 800 *l.* to the younger children of the son, to be paid at such days, times, manners, and proportions, as the son should direct and appoint, and for want of appointment, to be paid to them equally at twenty-one or marriage, with benefit of survivorship upon the death of any before; and if he had no child, the said 800 *l.* should not be raised, and the term should attend the inheritance. In 1749 he made a will, and devised 700 *l. per annum* to his son, upon condition that the son; within twelve months after testator's death, should convey the whole family estate, for better securing to the testator's sister-in-law *Anne Burges* 100 *l. per annum* for life, which he had before given her out of the said lands; with another condition, that the son should confirm his will, otherwise the 700 *l.* annuity to cease; and then makes a very large provision for the grandchildren at their age of twenty-five, or marriage. In 1750, the testator by a deed made his son tenant for life, instead of tenant in tail, as he was before, by levying a fine, and resettling the estate in the strictest settlement, and to no other uses. After his death, the question was, How far the claims of the son, his wife and children, under the agreement in 1773, were barred by any other provisions in the will of the father; and whether that was a satisfaction? The Master of the Rolls, Sir *Thomas Clarke*, said, that the deed in 1733 was a contract between the father and son, so as to make the son and his family purchasers from the father, and created a debt owing from the father to them: that the wife had clearly received no satisfaction for the debt contracted to her: that as to the children, by the articles in 1733 they were entitled to 800 *l.*, so as that every child must have had part of it; by the will the testator has given twenty times as much in the whole among them; but then it is so given, that if they do not arrive at the age of twenty-five or marry, they are entitled to nothing: this therefore did not fall within the rules of satisfaction to which the court had adhered: that as to the annuity of 50 *l.* for life to the son, independent on the deed in 1750, what is given by the will is not a satisfaction of that: for the annuity given by the will is *diverso intuitu*. It is the same as if the testator had devised the settled estate to his son for life, &c. subject to the annuity to *Anne Burges*; and then if the son had performed that condition, he would be entitled to claim under the deed in 1733: for the rule of satisfaction was never carried so far by construction as to make that answer a double purpose. That it stood thus with respect to this annuity of 50 *l.* merely upon the will; but by the deed of 1750 it was put out of the son's power to perform the condition annexed to the devise of the 700 *l. per annum*, which the son might have done when the will was made, he being then tenant in tail of that estate: the annuity of 700 *l.* therefore is, by the deed in 1750, a pure annuity, and free from the condi-

tion; and then it is the same as if the condition comprised in the will never had been mentioned; and if it had been pure and free, it would be a satisfaction of the 50 *l. per annum*. By the deed in 1750, then, it is within the general rule of satisfaction, though by the will it would not have been so.

Attorney-
General v.
Hird, 1 Br.
Ch. Rep.
170.

C. B. by her will gave to her brother *G. B.*, and the lawful heirs of his body, if he should have any, her whole fortune (except a few legacies), but if he should die without heirs, she gave to *J. S.* 1000 *l.*, and to *J. C.* 500 *l.*, the residue to her brother. The property was personal to the amount of about 5000 *l.* The testatrix died, and the brother surviving, and having no child, by his will gave a like legacy of 1000 *l.* to the said *J. S.*, to her sole and separate use, and also 500 *l.* to the said *J. C.* It was decreed, that the legacies given by the brother would be a satisfaction for the legacies given by the former will (supposing those legacies not to be too remote, as it was holden they were).

Pugh v.
Duke of
Leeds, 1 Br.
Ch. Rep.
67 note.

By settlement on the marriage of *Godolphin Edwards* and *Elizabeth More*, a term of 600 years was created to raise portions for daughters, by which it was provided, that in case there should be but one daughter, the sum of 5000 *l.* should be raised for such only daughter, to be paid at eighteen or day of marriage, with maintenance in the mean while. There was a proviso in the settlement, that in case the daughters should be advanced with portions in money or lands, equal in value to the portions thereby provided, in the lifetime of *Godolphin Edwards*, or he should give or leave them money or lands not equal in value, the trustees should raise only so much as would make the money, or value of the lands so given, equal to the portions provided. *Elizabeth*, the appellant, being the only daughter of the marriage, attained eighteen the 4th December 1746. *Godolphin Edwards* being possessed of 5300 *l.* East India annuities, which he had saved from the income of the estate, 21st November 1772 transferred them to the appellant *Elizabeth*, then the widow of Mr. *Manlove*. A bill had been filed, and the cause came on to be heard before Lord *Bathurst*, 25th June 17-6, when there was a decree in favour of the appellant for her portion of 5000 *l.*, the present question not being then before the court. The respondents afterwards exhibited their bill of review, stating, that since the pronouncing of the decree in that cause, they had discovered, that *Godolphin Edwards* had transferred to the plaintiff these India annuities in part of her portion. Upon the cause coming on to be heard, Lord Chancellor declared, that these annuities transferred by *Godolphin Edwards* to the appellant *Elizabeth*, were to be considered as having been so transferred in part satisfaction of the portion of 5000 *l.* under the marriage settlement, and therefore varied the former decree so far; whereupon an appeal was lodged in parliament, which being heard March 15th, 1780, it was ordered that the same should be dismissed, and the decree therein complained of affirmed.]

(E) Of Legacies vested or lapsed : And herein,

1. Where it shall be a lapsed Legacy by the Legatee's dying in the Lifetime of the Testator, and where in such Case it shall vest in another Person, to whom it is limited over.

IT seems by the rule of the civil law, and by the cases on this head, that if a legacy be devised to *J. S.*, and he die in the lifetime of the testator, that the legacy is lapsed, there being no such person to take at the time, when the will is to take effect.

So, where *A.* by will, reciting that *B.* owed him, 400*l.* gave and bequeathed those 400*l.* to him, provided he out of the 400*l.* paid several sums in the will mentioned to his wife and children, and the rest and residue he freely and absolutely gave to him, and willed and required the executor to deliver up the security immediately upon his death, and not to claim or meddle with the debt, or any part thereof, but to give such release or discharge as *B.*, his executors or administrators, should require or think fit ; and *B.* died in the lifetime of the testator : it was held, that the money directed to be paid the wife and children was well devised ; but as to the residue devised to the debtor himself, that it was a lapsed legacy, he dying in the lifetime of the testator (*a*) ; although it was admitted, that if the testator had said, *I forgive such a debt, or my executor shall not demand it, or shall release it*, that would have been a good discharge of the debt, though the debtor died in the lifetime of the testator.

Abr. Eq.
296, 297.

2 Vern. 521.
Elliot and
Davenport.
[1 P. Wms.
83. S. C.
(a) The
Lord Keeper
declared,
" that the
last clause in
the will,
(whereby it
was directed
that the se-
curity should
be delivered
up to the
said William
Elliot, his
executors,
administra-
tors, or

assigns, to be cancelled, and that no use should be made thereof,) was only in aid of the first clause in the will, by which alone the sum is to be taken as a lapsed legacy." Reg. Lib. A. 1705. fol. 521.]

[The testatrix, the grandmother of the plaintiff, devised in the following words: " I likewise forgive my son-in-law *Richard Chillingworth* a debt of 500*l.* due to me upon bond, and all interest that shall be due for the same at my decease, and de- fire my executor to deliver up the bond to be cancelled," and made her son *J. P.* executor. The legatee died in the lifetime of the testatrix. Lord *Hardwicke* thought the testatrix intended in all events the bond should be delivered up to be cancelled : that there was nothing personal in the present case for the direction that it should be delivered up. In *Elliot v. Davenport*, his Lordship said, the words are not penned as *forgiveness* or *remission* ; there was no intention to release the recognizance till Sir *William Elliot* paid 150*l.* thereout ; but here is a clear intention to release the debt. There, it was to be delivered up to Sir *William Elliot* ; here, in general, to be cancelled. There, the right of action subsisted, which was the reason of that opinion ; here, it would be too nice to make such a distinction, and would narrow too much the bounty intended by the testatrix to her family. His Lordship therefore decreed the bond to be delivered up to the plaintiff to be cancelled, but without costs.

Sibthorp v.
Moxom,
3 Atk. 580.

Toplis v.
Baker,
Excheq.
Hil. 1789.
1. Cox's P.
Wms. 86.
note.

In a will was the following clause: "I give to my kinsman *N. D.* the sum of 400*l.*, which he owes to me on mortgage of his estate in *S.*, and I further order my executor to *give him up* all bonds owing from him to me, and which shall be found in my custody at the time of my decease, together with all interest due thereon." The mortgage debt was also secured by bond; besides which, *N. D.* was indebted to the testator on another bond in 200*l.*: both bonds were in the custody of the testator at the time of his death. After great consideration, the court held this to be a lapsed legacy. The Lord Chief Baron, in delivering the judgment of the court, observed, that none of the circumstances which could be supposed to distinguish the case of *Sibthorp v. Moxon*, from *Elliot v. Davenport*, occurred in the present case. That the principal ground on which *Sibthorp v. Moxon* was decided, was this, *viz.* that there was nothing in the will to confine the delivery of the bond to the *person* of the son-in-law, and that charge therefore was not ancillary to the former bequest to him, but amounted to a declaration that in all events the bond should be delivered up, and therefore of necessity operated for the benefit of the representative; that in the present case, the word used by the testator was "*give*," and not "*forgive*;" and (what was more material) the bond was directed to be delivered up to *N. D.* (personally), and there was no direction whatever for delivering up the mortgage; and therefore the court saw no reason for departing in this case from the general rule, *viz.* that a testamentary disposition must lapse by the death of the legatee in the lifetime of the testator.]

Abr. Eq.
296. Burnet
and Hol-
grave.
[This case
of Burnet, v.
Holgrave is
much weak-
ened in point
of authority,
by the case
of Oke v.
Heath,
1 Ves. 135.
In that case
a feme-co-
vert having
by marriage
articles
power by
deed or will
to appoint
4000*l.* for
such persons
as should be
her kin, and
for none
other: the
4000*l.* in
default of
appointment

A. devised an estate to his wife for life, and after to the plaintiff, his niece, and her heirs, upon condition and to the intent that she pay 400*l.* to such person as his wife by her will in writing, or any other writing, should direct and appoint, and dies; the wife after marries a second husband, and then makes a will in writing, and thereby reciting the power given her by her former husband's will, appoints the 400*l.* to be paid to her husband, his executors or administrators, and that when he shall have fully received the 400*l.* he shall pay 100*l.* out of it to *B.*, 50*l.* to *C.*, and 50*l.* to *D.*, and makes her husband her executor; and then goes on, and says, that she has published this her last will and testament in the presence of three witnesses; and the husband subscribed that he approved of this will: the husband dies before her, and makes her executrix of his will, and residuary legatee; then *B.* and *C.* die both intestate, and afterwards the wife dies, and the defendants take out administration to her, with the will annexed, and also administration to *B.* and *C.*, and the question was, Whether this appointment being made by will, and the appointee dying before the appointer, this should be in the nature of a legacy, and so the appointment void, the testatrix surviving the nominee? And my Lord Keeper held, that if it was a thing purely testamentary, it would be plainly a lapsed legacy, but that in this case the 400*l.* was not in its own nature testa-

mentary,

mentary, but they take as nominees, and it is but the execution of a trust; and decreed the money to be paid.

to go according to the statute of

distributions; appointed by will to her nephew C. he in consideration thereof paying an annuity to his mother. C. died in the lifetime of the testatrix. Lord Hardwicke held, that by the death of the appointee in the lifetime of the testatrix, the appointment was void; for though it arises under a power, it is a testamentary disposition, and subject to all the qualities of a will. The case of *Burnet v. Holgrave*, his Lordship said, is a very particular and extraordinary case, and, he doubted, if it would be so determined now: it appeared by the register to have been a cause by consent, and not adversary; which takes off greatly from the weight of the opinion there, shewing it to have been probably sudden, and without consideration. But taking it as it is, his Lordship observed, there are several differences: first, the wife there, by marrying a second husband, had disabled herself from making a will; nor is the power given her to be executed during coverture; therefore, it could not be a will, but must be considered as a writing under hand and seal only; and then the determination may be right: but that is nothing to this, which is by a will properly proved as such. But, suppose the court took it as a will, or a writing in nature of a will; the appointment, there, was not personally to the husband only, but the executors or administrators, and on trust to pay thereout. It is true, that in general the words *executors or administrators* are understood as representatives only, but not always; as in cases *per autre vie*, executors or administrators take, not as representatives of the first taker, but as new special occupants newly named in the will or deed: and if they took further so as to be persons taking the trust, in that light it is different. And the court rather did this in support of the trust, one of the *cestuy que trusts*, for whose benefit it clearly was, being then living; nor can the *cestuy que trust* be defeated by the death of the trustee in the testator's life. The words are that the court took it to be an execution of a trust; which is not a misprint instead of *power*; and imports the husband, his executors or administrators, to be barely trustees. Another thing in support of that determination is, that all was come back to the wife herself; the husband, to whom and his executors she had appointed, dying in her life, and making her executrix.]

So, where E. made her will, and devised in these words, *I give unto my loving kinsman R. H. the son of 300 l. one 100 l. part whereof, he doth owe me, which I intend to give to my cousin S. H. his youngest daughter; but my will and desire is, that he will give the said 300 l. to his daughter S. H. at the time of his death, or sooner, if there be occasion, for her better advancement and preferment*; the testatrix, at the time of making her will, was in *England*, and it happened that R. H. died in *Ireland*, eight days before the death of the testatrix; afterwards S. H. died, at the age of sixteen, and unmarried, and the plaintiff was her administrator; and it was decreed at the Rolls, and affirmed by my Lord Chancellour, that the words *I desire*, or *I will*, amount to an express devise, and that the 100 l. bond to the testatrix should be assigned to the plaintiff, and the 200 l. paid him, with interest, from the time of exhibiting the bill; although it was insisted upon, that a benefit was designed R. H., and that he was not a bare trustee; for he was to have the interest of the 300 l. for his life, unless his daughter had occasion for it before his death, which she had not.

But if the testator gives his sister 350 l. upon condition that she, at or before her death, give to her children 200 l. thereof, and the sister dies in the lifetime of the testator, the whole legacy is lapsed; although it was insisted, that if the devise had been only of the interest of the 200 l. to the testator's sister for life, and the principal to the children, that had been a good devise to the children as to the 200 l., and it would not have been lost by the mother's dying in the testator's lifetime, and the intention of the testator in this case amounted to as much; but it was adjudged *ut supra*, the court taking it, that, being a devise of money, the absolute property vested in the first legatee: *Quare*.

[J. S. (*inter al.*) bequeathed the surplus of his personal estate unto four persons equally to be divided between them, share and

2 Vern.
466-7.
Earles v.
England.
Piec Chan.
200. S. C.

2 Vern. 116.
Birkhead v.
Coward.

Bagwell v.
Dry, 1 P.
Wms. 700.

share alike. One of the four residuary legatees died in the lifetime of the testator; and the question being, to whom the fourth part bequeathed to the legatee so dying, should belong? Lord Chancellor was of opinion, that the testator having bequeathed his *residuum* in fourths, and one of the residuary legatees dying in his lifetime, the devise of that fourth part became void, and was as so much of the testator's estate undisposed of by the will; that it could not go to the surviving residuary legatees, because each of them had but a fourth devised to them in common, and the death of the fourth residuary legatee could not avail them, as it would have done, had they been all joint legatees, for then the share of the legatee dying in the life of the testator would have gone to the survivors (*a*). But here the *residuum* being devised in common, it was the same as if a fourth part had been devised to each of the four, which could not be increased by the death of any of them.

(*a*) Show. g. 1.
Salk. 238.

Page v.

Page, 2 P.
Wms 489.
Mosel. 42.
S. C.

One devised the residue of his personal estate to six persons, to each of them a sixth part, and made them executors. One of these executors and residuary legatees died in the lifetime of the testator. *Per* Lord Chancellor—This is a lapsed legacy as to one-sixth, and undisposed of by the will, the residuary legatees being tenants in common, and not joint-tenants.

Owen v.
Owen,
1 Atk. 494.

A testatrix, after several legacies, bequeaths in these words: "All the rest and residue, &c. I give and bequeath to my two nieces *M.* and *E.* daughters to my nephew *W. O.*, and *A.* his wife, whom I desire to be trustees for their children, to take care of their legacies for them, they being of tender age; and my will is, that my estate be equally divided between my two nieces *M.* and *E.*, whom I nominate and appoint my executrices accordingly." One of the nieces died in the lifetime of the testatrix. Lord *Hardwicke* thought that the bequest to the two nieces did not make a joint-tenancy, for the words *equally divided*, though not annexed to the clause which gives the residue, can relate to that only; the consequence was, that it was a lapsed legacy.

Peat v.
Chapman,
1 Vez. 542.

A testator desired all the rest and residue should be divided between two. By the Master of the Rolls—This must be understood to be *equally divided*; and by the death of one in the lifetime of the testator, his moiety shall not survive to the other devisee of the residue.

Ackroyd v.
Smithson,
1 Br. Ch.
Rep. 503.

A testator gave several legacies to *A.*, *B.*, *C.*, *D.*, *E.*, *F.*, and *G.*, and afterwards directed all his real and personal estate to be sold, and after payment thereof of his debts and legacies, he ordered the residue to be paid to the said *A.*, *B.*, *C.*, *D.*, *E.*, *F.*, and *G.*, in proportion to their several and respective legacies therein to them bequeathed. Two of the residuary legatees died in the testator's lifetime. Lord *Thurlow* was clear, that this was a tenancy in common in the residue, and therefore the shares of the two who died in the testator's life had lapsed.

Man v.
Man, 2 Str.
905.

S. M. by his will gave the use of his personal estate to his wife for life, if she should so long continue his widow, and after her death

death to *A.*, *B.*, *C.*, and *D.*, share and share alike. *C.* and *D.* died in the lifetime of the testator. Adjudged, that the shares of *C.* and *D.* had lapsed, the testator having particularly appointed that each of his legatees should have a special share.

A testator left a legacy to *M.* his executors, administrators, or assigns. At the time of making the will, *M.* was dead. This is a lapsed legacy, notwithstanding the words are to *M.*, his executors, administrators, and assigns; nor is parol proof admissible, that the testator knew of the legatee's death, as an argument, that he meant, it should be transmissible to his personal representative.]

Maybank v. Brooks,
1 Br. Ch.
Rep. 84.

But however a legacy may become void or lapsed by the legatee's dying in the lifetime of the testator, yet it is plain, that if in such case there be a limitation over to another, that the limitation over is good, though the first legatee die in the lifetime of the testator; as, where *A.* devised 500*l.* a-piece to his two grandchildren by name, and if either of them die, his share to go to the survivor; one of them died in the lifetime of the testator; it was held, that his share should go to the survivor, and was not a lapsed legacy.

Preced.
Chan. 470;
471.

So, if *A.* devise 1500*l.* a-piece to the four children of *J. S.* by name, to the sons to be paid at their age of 21 years, and to the daughters at eighteen, or days of marriage; and in case one or more of the afore said children shall happen to die before his, her, or their respective legacy or legacies shall become due, then such legacy or legacies shall go to the survivors of them; and in case three should die, then the survivor to take the whole; if one of the children dies in the lifetime of the testator, the survivors shall take that share, and it shall not be a lapsed legacy.

2 Vern. 207.
Miller and
Warren, de-
creed
2 Vern. 611.
Ledfome
and Hick-
man, S. P.
dec eed.
Willing v.
Baine, 3 P.
Wms. 113.
S. P.

So, where a legacy of 50*l.* was given to *A.* at twenty-one, or marriage, and 50*l.* to *B.* at twenty-one, or marriage, and in the close of the will the testator added, *If any legatee dies before his legacy is payable, the same shall go to the brothers and sisters of such legatee;* *A.* dying in the lifetime of the testator, it was adjudged no lapsed legacy, but that it should go to his sister.

2 Vern. 378.
Dorrel and
Molesworth,
Vern. 425.
2 Vern. 653.
744. S. P.
Hornby v.
319. S. P.

So, where a man devised 100*l.* to *A.* and *B.*, the two daughters of his brother *G.*, to be paid within a year after the death of his wife, viz. 50*l.* to *A.*, and 50*l.* to *B.*, if they shall be both alive at the time of payment; but if either of them should die before, then the said 100*l.* to the survivor of the said two daughters: one of the said two daughters died in the lifetime of the testator; and the only question was, Whether the surviving daughter should have the whole 100*l.*, or only the 50*l.*? and *Rawlinson* and *Hutchins*, Lords Commissioners, were clearly of opinion, that she should have the whole 100*l.*; they said, that by the first clause of the will it is a joint devise to them of the 100*l.*, in which case, if the will had gone no farther, if one had died, it would have survived to the other; then the viz. that comes after is only a severance of it, in case they should both live to the time of payment, which they did not; and then the last clause of the will, in case

Abr. Eq.
298.
Scolding
and Green.

either died before the time of payment, is a new substantive devise of the whole 100*l.* to the survivor; and decreed accordingly.

Abr. Eq.
243. Trin.
1700, Hunt
and Berkley.
Mofel. 47.
S. C.

So, where one made his will, and, after several legacies, gave and devised all the rest, residue, and remainder of his personal estate to three persons, whom he thereby made his executors, one of them died in the lifetime of the testator; and the only question was, Whether the two surviving executors should have the whole; or whether the third part should be distributed, according to the statute, amongst the next of kin? And the Master of the Rolls, on time taken to consider of the case, and citing most of the authorities, both out of the civil and common law, was of opinion, and decreed accordingly, that the two surviving should take the whole.

Northy v.
Burbage,
Gibb. Eq.
Rep. 137.

[A devise was of 500*l.* a-piece to two of the testator's grandchildren by name; and if either of them died, his share to go to the survivor; and if both died, then their shares to go to their mother: one of them died in the lifetime of the testator, yet his share went by the express words of the will to the other grandchild, and was held to be no lapsed legacy.]

Buttar v.
Bradford,
2 Atk. 220.

A testator having divided his personal estate into eight parts, bequeathed four parts to his niece *B.*, and the children born of her body. The plaintiff was born after the making of the will, and *B.* died in the testator's lifetime. This was adjudged not to be a lapsed legacy, for the plaintiff took as joint-tenant with *B.*, and upon her death is entitled to the whole by survivorship.

Sibley v.
Cook,
3 Atk. 572.

A testatrix devised (*inter al.*) as follows: "I give and devise the several legacies and sums following, which I will shall be paid to the several persons hereinafter named; and that if any of those persons should die before the same become due and payable, I will that they, or any of them, shall not be deemed lapsed legacies;" then she particularized the several legatees, and says, "To Anne the wife of *Richard Wensley*, and to her executors or administrators, I give the sum of 50*l.*" *Anne Wensley* died in the lifetime of the testatrix, and her husband administered to her. Lord *Hardwicke* said, I am of opinion this is not a lapsed legacy. If a man devises a real estate to *J. S.* and his heirs, and signifies or indicates his intention, that if *J. S.* dies before him it should not be a lapsed legacy, yet, unless he had nominated another devisee, the heir at law is not excluded, notwithstanding the testator's declaration. So, in the bequest of a personal legacy to *A.*, though the testator should shew an intention that the legacy should not lapse in case *A.* die before him, yet this is not sufficient to exclude the next of kin. But, here, in case *Anne Wensley* dies before the testatrix, she expressly provides against the lapsing, for she says, *If any of these persons die before the same become due or payable, I will, that they or any of them shall not be deemed lapsed legacies*; and subsequent to this, bequeaths to *Anne* and her executors and administrators 50*l.*, so that in case of her death before the testatrix, other persons are named to take, which distinguishes it from the case I put before; and in *Derrel v. Moleworth*, the court laid

a stress

a stress upon the words *was payable*, which are much the same with the present, *become due or payable*. And upon the authority of this case, his Lordship decreed the legacy to the husband.

A testatrix conveyed the residue of her personal estate to *J. W.* and seven other persons, equally to be divided between them, share and share alike; and she directed, "that in case of the death of any of them (the said residuary legatees) before her, then the share or shares of him, her, or them, so dying before her, should go to, be had and received by his or her legal representatives." *J. W.* died in the lifetime of the testatrix. His share was prevented from lapsing, and those persons are entitled to it as his legal representatives, who would have been entitled as next of kin to him at the death of the testatrix.

Bridges v. Abbot,
3 Br. Ch.
Rep. 224.

A testator ordered the interest of the residue of his personal estate to be paid to his sisters for their lives equally between them, and in case any of them should die leaving issue, he directed his trustees "to pay and transfer the share and proportion of the residue to which his sister so deceasing was entitled, at or before the time of her decease, to receive the interest and dividends thereon, unto and amongst all and every such child or children of such deceased sister, equally between them, share and share alike, at their respective ages of 21 years." One of the sisters died in the lifetime of the testator. Adjudged, that her children were entitled to her share of the residue.]

Rheeder v. Ower,
3 Br. Ch.
Rep. 240.

2. Where a Legacy shall be said to be vested or lapsed, being to be paid at a future Time, to which the Legatee did not arrive.

The rule and distinction which hath obtained in these cases, and which is agreeable to the rule of the civil law, is, that if a legacy be devised to one generally, to be paid or payable at the age of twenty-one, or any other age, and the legatee die before that age, yet this is such an interest vested in the legatee, that it shall go to his executor or administrator; for it is *debitum in presenti*, though *solvendum in futuro*, the time being annexed to the payment, and not to the legacy itself; but if a legacy be devised to one at twenty-one, or if, or when he shall attain the age of twenty-one, and the legatee die before that age, the legacy is lapsed; and though, says my Lord *Cowper*, this distinction was at first introduced upon very slender reasons, and probably upon no other but from a constant willingness in the civil law to stretch in favour of a particular legatee against the residuary legatee, who went away with the whole surplus of the personal estate; yet, it being the rule of the ecclesiastical courts, it is fit that the same rule should be observed in Chancery, as this court has now a concurrent jurisdiction with the ecclesiastical courts in matters of this nature; and therefore there ought to be a conformity in their resolutions, that the subject may have the same measure of justice, in which court soever he sues.

This distinction is laid down in
Dyer, 59.
Leon, 177.
Swinb. 311.
313.
Off. Ex.
347.
Godb. 182.
2 *Vent.* 342.
Cloberie's
case.
2 *Chan.*
Cases, 155.
2 *Salk.* 415.
pl. 2.
Carth. 52.
Vern. 462.
2 *Vern.* 673.
Preced.
Chan. 21.
Abr. Eq.
294, 295.
Bur. Rep.
227. *Atk.*
Rep. 504.

Pach.
7 Anne,
Strick v.
Hudson, in
Canc.

But if legacies are given to children, and if any die, their legacies to survive, yet after twenty-one, or marriage, there shall be no survivorship, though the words are general.

2 Vern. 673.
Stapleton v.
Cheales, Pr.
Ch. 318.
S. C. Gilb.
Eq. Rep. S. C.

So, if a legacy of 50*l.* is devised to J. S. when of the age of sixteen years, and interest in the mean time, to be paid quarterly, this is a legacy vested, and shall go to the representative of the legatee, because it carries interest.

2 Salk. 415.
Snell and
Dee, pl. 2.

But if *A.* devise in these words, *viz. I give 100*l.* a-piece to the two children of J. S. at the end of ten years after my decease*, and the children die within the ten years, this is a lapsed legacy, and is so in all cases where the time is annexed to the legacy itself, and not to the payment of it; though it was objected, that this differed from the case where a man devises 100*l.* to J. S. at his age of twenty-one; because it is a contingency whether he will attain to that age; but the expiration of the ten years is inevitable.

Abr. Eq.
295-6.
Onslow v.
South.

Again, one being possessed of a very considerable estate, part in *Jamaica*, and part in *England*, and being himself resident in *Jamaica*, made his will, and thereof appointed several executors, some for his estate in *Jamaica*, and others residing in *England*, for his estate here, and, amongst other things, devised in these words, *viz. I give and bequeath to J. S., now under the custody of R. D., the sum of 2000*l.* at the age of twenty-one years, to be paid by my executors in England, and devised all the rest and residue of his estate to the plaintiff, and died. J. S. having attained the age of eighteen, made his will, and thereby devised this legacy, and all his estate, to the defendant. My Lord Chancellour held this a lapsed legacy, and that it was a vain endeavour in the defendant's counsel to construe it a present legacy, and therefore vested by the word *now*, because it was a plain description of the condition of the legatee, *viz. now* under the custody of, &c., for otherwise they must stop at *now*, which would be playing with the words; and though the word *paid* was made use of, yet it was plainly intended a designation of the persons by whom the legacy was to be paid, *viz. by* his executors in *England*, which was proper, he having two sets of them.*

Love v.
L'Estrange,
3 Br. P. C.
337.

[A testator gave all the residue of his personal estate, after debts and legacies paid, to trustees, until *W. N.* should attain his age of twenty-four years; from the age of twenty-one until the age of twenty-four to pay him thereout an annuity of 10*l.* yearly; and thenceforth in trust for him, his executors, administrators, and assigns. *W. N.* attained his age of 21, but died before his age of 24 intestate. It was decreed, that the representative of *W. N.* was entitled, as the right vested in him immediately upon the testator's death.

Corbet v.
Palmer,
2 Eq. Ca.
Abr. tit.
Legacies
(A), pl. 27.

J. C. bequeathed his personal estate to his wife for her life, and gave several particular legacies after her death, and then declared, that the residue at her decease, and after the legacies paid, should be divided between his relations *A.*, *B.*, *C.*, and *D.*—*A.* and *B.* died in the lifetime of the wife, and after her decease, the

administrator of *A.* and *B.* had a decree for their shares; for by Lord *Talbot*, the time of payment was future, but the right to the legacies vested upon the death of the testator.

A testatrix bequeathed her personal estate to her daughter, to be sold and disposed of by such parcels, and at such times, and in such manner, as she should think fit, and out of the money arising by sale thereof to pay her debts; and the residue thereof she willed should be equally paid and divided to and between *E. S.* and *T. S.*, her two grandchildren, at such time as they should severally attain their respective ages of twenty-one, *or sooner*, if her daughter should think fit, and appointed her daughter sole executrix. Lord *Hardwicke* said, if it had rested upon the words, *at such time as they should severally attain twenty-one*, he should have thought that the legacies did not vest till then, and that it would have been the same thing as if the testator had said, "I give it them at twenty-one." But what is the meaning of the testatrix's saying *or sooner*, if her daughter should think fit? Not to hinder the legacies from vesting; but she considered her daughter as the natural guardian of her children, and left it to her discretion to accelerate it, if she thought proper. And as the testatrix, by the whole tenor of her will, left the mother a trustee only for the children, without giving her any power over the capital of the legacies, his Lordship was of opinion that the legacy vested in *E. S.* and *T. S.* at the death of the testatrix.

Steadman v.
Palling,
3 Atk. 423.

T. A. bequeathed the residue of his personal estate to his wife for life; "but if it shall happen that my wife shall depart this life, leaving no child or children at the time of her death, then my will is, that my trustees shall transfer the securities in which my estate shall then be vested to my two brothers, or, if either of them shall depart this life without issue, then to the survivor, and I hereby give the same to *J. A.* and *H. A.* accordingly." *J. A.* and *H. A.* survived the testator, but both died in the lifetime of the wife. Lord *Thurlow* declared, that the interest vested in them as joint-tenants, and *H. A.* having survived *J. A.*, it belonged, subject to the wife's interest for life, to the personal representative of *H. A.*

Barnes v.
Allen,
1 Br. Ch.
Rep. 131.

J. M. by will gave his wife the use of 800 *l.* for life, and from and after her decease disposed of the same as follows: that is to say, to *L. H.* 100 *l.*, to *M. M.* 100 *l.*, to *E.* and *C. H.* 100 *l.* each, to *M. H.* 5 *l.* a-year. Then followed other devises, some of real, some of personal estate, among others to a servant 5 *l.*, and then the legacy on which the question arose. "*I also give to J. M., son of my brother G., the sum of 100 l.*" He then gave the rest and residue to his wife. The nephew *J. M.* (the legatee of the 100 *l.*) died in the lifetime of the testator's widow. His legacy was holden to be vested, and transmissible to his personal representative.

Monkhouse
v. Holmes,
1 Br. Ch.
Rep. 298.

L. made his will, and subject to his debts was a clause, by which he gave the whole of his estate to *J. M.*, in order to pay the income to his (the testator's) mother *H. L.* for life, and after her decease, he then gave to five persons the sum of 500 *l.* each

Benyon v.
Maddison,
2 Br. Ch.
Rep. 75.

3 per cent. annuities, and to *J. B.* and *M.* his sister, the sum of 100*l.* 3 per cent. annuities. All the rest and residue he gave to his executor, and empowered him to dispose of by will the *residuum* he would be entitled to after the decease of his (the testator's) mother. *J. B.* died in the lifetime of the testator's mother. His legacy vested immediately upon the testator's death.

May v.
Wood,
3 Br. Ch.
Rep. 471.

A testator bequeathed to his daughters the sum of 3000*l.* 5 per cent. navy annuities, and all the dividends and proceeds arising therefrom, to be equally divided between them, and all his estate at *S.*, to be equally divided between them, *when they should arrive at twenty-four years of age.* One of his daughters died before she attained her age of twenty-four years. The Master of the Rolls was of opinion, that according to the true rule of construction, the word *when* could not be otherwise considered than as denoting the period of payment, and must not be deemed as a condition precedent, upon which the legacy was to vest, but merely postponing the payment of this 3000*l.* with the dividends thereon till twenty-four; and therefore declared, that the personal representative of the deceased daughter was entitled to a moiety of the 3000*l.* 5 per cent. navy annuities.

Barlow v.
Grant,
1 Vern. 255.

A legacy of 30*l.* was given to an infant to bind him an apprentice. The infant died before he attained a proper age to be bound an apprentice. It was decreed, that this legacy was vested; and the infant being 17 years old, and having made a will, and named an executor, it was allowed to be a good disposition of the 30*l.*

Collins v.
Metcalf,
1 Vern. 462.

The giving of interest before the payment has been considered as evidence of an intention to vest the legacy. Hence, where a portion was devised to a child with interest, but not to be paid or payable, until the child should attain twenty-one years, or be married; and the child died under twenty-one and unmarried; it was decreed, that the portion should go to the administrator of the child.

Pr. Ch.
317.

So, in the case of *Stapleton v. Cheales*, *supra*, if the testator had there added, that in the mean time, or until the legatee attain the age of twenty-one, he should have interest for the legacy at such a rate, from the time of his (the testator's) decease, this subsequent clause would explain the intent of the testator, so as to make the legacy, which was the principal, an interest vested, which shall go to his executors or administrators, though the legatee die before that age, because, if the principal were not due presently upon the testator's decease, there could no interest accrue to the legatee at the time.

Neale v.
Willis,
Barnardist.
Ch. Rep. 43.

Again, *T. B.* being possessed of a considerable personal estate, by his will gave *J. N.* 600*l.* to be laid out in the names of his executors, as counsel should advise, in the purchase of some advowson or advowsons, or other spiritual preferment for him, and until the same should be purchased, ordered his executors to place out the 600*l.* at interest in their names, and continue the same until such preferment could be had, and to pay *J. N.* such interest for his maintenance; and if there should be a remainder after the pay-
ment

ment of the purchase, directed the same to be paid to him ; but if he should afterwards lend him any money upon bond or note, it should be deducted out of the 600 *l.* but without interest. *T. B.* afterwards by his will directed, that if his brother-in-law *R. N.* should be living at his decease, he thereby charged *R. N.*'s three sons, *viz.* the said *J. N.* and *T.* and *R.*, to pay their father yearly during his life, 20*s.* out of each of their legacies ; and then directed, that if *J. T.* and *R. N.* should die before their legacies should become payable, that then the legacies of them or him so dying should not be paid, but fall into the *residuum* of his personal estate, and be applied as the same was directed. *J. N.* died about a year after the death of the testator, being at that time about twenty-five years of age. The 600 *l.* given him by the will was never paid him, nor was it ever laid out according to the directions of the will. The question was, Whether the 600 *l.* given to *J. N.* by this will, was transmissible to his administratrix with the will annexed ? Lord *Hardwicke* was of opinion, that it was : for it is payable at the death of the testator, and if *J. N.* had, instantly upon the testator's death, found out a purchase for the money to be laid out in, he might have demanded it. There is no suspension of the interest arising from the legacy, till the advowson can be purchased ; but, on the contrary, interest is to be paid on the legacy in the mean time, and that to *J. N.* himself. And as to the clause respecting the devise over, the words of it may well be answered by construing it to mean no more, than that the legacies given to the nephews should sink into the estate in case any of them had happened to have died in the testator's lifetime.

A testator bequeathed to *C. F.*, when he shall have attained the age of 25 years, 1000 *l.* which he empowered his four sons his executors, guardians, and trustees of the will, to lay out on such securities as they should think fit, and the interest or income thereof to be for or toward the education of the infant as they should think fit, as also part of the principal to put him apprentice, and the remainder to be paid him when he should have attained his age of twenty-five, and not before. The question was, Whether the time of twenty-five years was put in, in order to postpone the vesting of the legacy, or only to postpone the payment of it ? Lord *Hardwicke* held, that it was only to postpone the payment. Where a testator gives interest in the mean time, he gives a property in the principal, unless something arises on the face of the will to take off the force of it. And this case is still stronger than that, there being a direction to dispose of part to put him apprentice, to which a court of equity would compel the executors, it being obligatory upon them ; and their discretionary power being confined to the securities, the executors might have taken the greater part, almost to the extent of the whole, to place him out ; which shews, it arises from his property. In the case of the *Attorney-General v. Hall*, in Lord *King's* time, where the testator gave a legacy to one for life, and so much as he did not dispose of gave to a charity, it was held, the legatee might dispose of the whole :

Fonnereau
v. Fonnereau, 3 Atk.
64*s.* 1 Vez.
118. S. C.

fo, here is a direction very near to the whole of the principal; which can arise only from his having the property.

Walcott v.
Hall, 2 Br.
Ch. Rep.
305.

7. *P.* bequeathed to his godson *T.* the plaintiff, the sum of 50*l.* to be paid to him at the age of twenty-one years, or day of marriage, which should first happen, the same to be put out at interest in the name of his executors and administrators, the interest arising therefrom from time to time to be applied towards his maintenance and education; and if he should die before 21, or marriage, he gave the legacy to his executors in trust for the poor of *S.*, and appointed the defendant his executor. The defendant proved the will, retained 50*l.* for the payment of the legacy to the plaintiff, and paid over the residue (after payment of debts and legacies) to the residuary legatees, and afterwards became bankrupt, and obtained his certificate. By the Master of the Rolls, this was a vested legacy, and as such, might have been proved under the commission. The giving interest always vests personal legacies. It was therefore vested, subject to be divested, on the legatee's dying under 21, and although it might not have been proveable as a debt, yet the guardian, upon petition, would have been admitted to prove it. The certificate therefore bars it.

Atkins v.
Hiccocks,
1 Atk. 500.

A testator devised in these words: "I devise to my daughter *E. H.* the sum of 200*l.* to be paid her at the time of her marriage, or within three months after, provided she marry with the approbation of my two sons *W.* and *S. H.* or the survivor of them; and my will is, that my said daughter *E.* shall yearly receive and be paid, until such time as she shall marry, the sum of 12*l.*, free and clear of all taxes and impositions whatsoever." And he willed, that his leasehold estate called —, should stand charged with the payment of the 12*l. per ann.* and likewise with the payment of the 200*l.* when the same should become due, and devised the said leasehold premises, and his whole personal estate to his two sons, and made them executors. *E.* died after 21, but without being married, and her administrator claimed the legacy of 200*l.* But Lord *Hardwicke* was of opinion, that it was not a vested legacy; for that when the time annexed to the payment is merely eventual, and may or may not come, and the person dies before the contingency happens, he could find no instance, where it had been held, that the legacy should in all events be paid: that the rule as to vesting is founded upon another rule, *certum est quod certum reddi potest*, and it is plain the testator did not regard the point of time, but the fact that was to happen, *the marriage*, which makes it a legacy on a condition, and cannot be demanded till the condition is satisfied; that as to what had been insisted, that the testator's giving 12*l. per ann.* to *E.* till the contingency of her marriage, is in the nature of interest for the 200*l.*, and that from thence it appears to be his intention, that the legacy should vest in the mean time; whenever this doctrine has been allowed, the payment of the principal hath been certain, and so not similar to the present case, because, here, this is not meant as interest, for it is an annuity of 12*l. per ann.* charged upon, and issuing out of an estate.

The

The above authorities, it must be observed, are applicable only where the legacies arise out of a fund *merely personal*: for with respect to interests arising out of land, these rules are totally different; for whether the land be the primary or auxiliary fund, whether the legacy be given with or without interest, the *general* rule is, that charges upon land payable at a *future* day, shall not be raised, where the party dies before the time of payment. Therefore where *T. S.* by will gave his daughter 1000*l.* to be paid by his executor, at her age of 21, or marriage, which should first happen, willing the same to be raised out of the rents and profits of his lands; and further willed, that in case his son should die before his age of 21 years, or without heirs of his body lawfully begotten, then from and after the death of his son, he gave all his said lands, &c. to the defendant, he making up his daughter's portion 2000*l.*; and the daughter died soon after the testator's death an infant and unmarried; upon which her mother took out letters of administration and claimed the 2000*l.*; it was decreed, that she was not entitled to any part of it, for it appears, that the intention of the testator was, that it should be for a portion, and it is expressly called a portion in the will: it is no personal legacy, but money to be raised out of the rents and profits of lands, and the payment is expressly to be at 21 years, or marriage.

A. having entailed his lands on his son, subject to a mortgage, devised his leasehold and personal estate for the payment of his debts and legacies; directing, that if his personal estate was applied to pay off his mortgage, the same should be kept on foot to make good his daughter's portion, and bequeathed to his daughter 3000*l.* to be paid her at 21, or marriage, if married with consent; if not, then but 1000*l.* The daughter died under age, and unmarried. It was decreed, that this being a portion and charged upon land, should extinguish in the land for the benefit of the heir. Besides, the devise being of 3000*l.* at 21 or marriage, which marriage was to be had by consent, it did not vest in the daughter, but was contingent.

A. devised his lands to his eldest son *B.* in fee, and added, "But my will and mind nevertheless is, that *B.* shall pay out of the lands so devised to him, the sum of 600*l.* viz. to my daughter *M.* 200*l.* at her age of 21 years, and to my son *J.* 200*l.* at his age of 21, and to my son *N.* 200*l.* at his age of 21; and if my son *B.* shall die before he attain the age of 21 years, then my will is, that my son *J.* shall not have the 200*l.* settled on him, but that it shall be paid to my daughter *M.* and son *N.*, to be added to their portions, and *J.* to have all the estate given to *B.* paying the 600*l.* as before expressed; and my said children shall be allowed 4*l.* per ann. maintenance for every 100*l.* till their several portions are paid." *B.* died before 21: the plaintiff married *M.* and has issue by her. *M.* dies two months before her age of 21. The question was, Whether this was not a subsisting charge upon the land, and an interest so vested in *M.* as to entitle the plaintiff, as her administrator, to the legacies?

Duke of
Chandois v.
Talbot, 2 P.
Wms. 612.
Bateman v.
Roach,
9 Mod. 106.
Smith v.
Smith,
2 Vern. 92.

Yates v.
Phetiplace,
2 Vern. 416.

Carter v.
Bletsoe, Pr.
Ch. 267.
2 Vern. 617.
S. C. Gilb.
Eq. Rep.
11. S. C.

legacies? Lord Chancellour dismissed the bill as to the demand of both the legacies, because there were no words in the will which vested any interest in those legacies before the age of 21 years; and as to the other 100*l.* that was governed by the other legacies.

Pr. Ch. 318. In the case of *Stapleton v. Cheales*, *supra*, it is said, if such portion were to arise out of lands or a term for years, though it were limited to the party *generally* to be paid, or payable at such an age, there, for the benefit of the heir, the portion should sink, and not go to the representatives of the party so dying.

Jennings v.
Looks,
2 P. Wms.
276.

One has two sons *R.* and *T.*, and being seised in fee of the manor of *B.* (which manor was in mortgage) makes his will, thereby devising 1000*l.* to his younger son *T.* (being then about a year old) to be paid to him when he should arrive at his age of 21, out of the manor of *B.*, with a power to the executors by felling timber growing on the estate to raise such monies, as his personal estate should fall short of, for the payment of his debts and legacies. The younger son *T.* dies about the age of two years, and the eldest son *R.* about the age of six, upon which the estate comes to the uncle, and the mother having administered to the younger son, claims the 1000*l.* legacy. But Lord Commissioner *Jekyll* said, that it was determined about the latter end of Lord *Somers's* time, in the case of *Yates v. Phettiplace*, *supra*, that where one by will gave a portion to a child out of a real estate, payable at a future time, and the child died before that time, the portion should sink; nay, that it should sink as well for the benefit of an *heres factus*, as of an *heres natus*, for the former is substituted by the testator in the place of the latter; and the true reason is, that the legacy being given as a portion, when the child dies before the portion is payable, there is no occasion for it; and equity will not countenance the loading of an heir for the benefit of an administrator. And it being objected, that though this might be true as to a portion given out of a real estate, yet here the legacy was a charge also upon the personal estate, and therefore that if the real estate was not sufficient for the payment of the said legacy, yet the personal estate should be liable; and that this was the plainer from the executor's being empowered to sell timber for the payment of such of the legacies as the personal estate was not sufficient to pay; the court said, this must be intended such of the legacies as the personal estate was liable to pay; it is true, were the legacy chargeable on the personal as well as real estate, that so much thereof as the personal estate would extend to pay, should go to the executors or administrators of the child; but this is a charge only upon the land.

Rich v.
Wilson,
Mosc. 68.

Sir *R. R.* settled all his lands in trust for the payment of debts and portions to his children, as he should direct by his will. Afterwards, he makes his will, and gives 1000*l.* a-piece to his five sons, payable at their respective ages of 21, with interest in the mean time, and bequeaths all his personal estate to his lady for her sole use and benefit, and makes her executrix. Sir *R.* dies, and afterwards *R.*, one of the sons, dies under the age of 21, and Lady *R.* takes out administration to him, and Mrs. *W.* the defendant, his
sister,

sister, sues her in the spiritual court, (she being in possession both of the real and personal estate of Sir R. R.) for a distribution of the 1000 *l.* bequeathed to her brother by her father's will. Lady R. files a bill, and moves for an injunction to the spiritual court, because the portion of the son was charged on the real estate, and therefore ought not to be sued for in that court; and the whole personal is given to the plaintiff. Lord Chancellour granted the injunction.

M. T. being entitled to the reversion of an estate after the death of his wife, "devised it to *C. D.* and his heirs, so as he should pay " to his sister *E. O.* the sum of 100 *l.*, within six months after the " reversion came into possession, and devised the rest and residue " of his personal estate, all his debts and legacies before bequeathed " being first deducted, to *C. D.* and another, whom he made his " executors." *E. O.* died in the lifetime of the wife, and upon the death of the wife *E. O.*'s representative brings a bill against *C. D.* for the 100 *l.* It was insisted by the plaintiff's counsel, that the legacy is vested, and only the time of payment postponed for the convenience of the estate, as it was a dry reversion. But Lord *Hardwicke* thought, that the gift of the sum of money is only by direction for the payment; and that it cannot be said, this is an original gift so as to vest the legacy, and the payment only postponed to a future time. Another distinction was attempted, that the time of payment was not taken from the nature of the legacy, or the circumstances of the legatee, but from the nature of the estate, and that therefore this is different from all the cases. But Lord Chancellour said, if he should give into this reasoning, he should overturn the cases of portions, or of other sums bequeathed; for that of late years it had been holden, that where a sum of money is given by way of portion, or as a general legacy, charged upon land, if the party dies before the time, it cannot be received. In the present case, there is no contingency, the time is single, within six months after the death of the tenant for life, when the reversion came in possession, so that it never could be raised, because the person died before the time for raising it.

T. C. devised all his lands to *J. C.* and *J. P.* in trust, that they should sell his lands in *M.* and *P.*, and out of the purchase money pay his debts; and as to the rest of the lands in trust to receive the rents, and to make leases for 99 years determinable on three lives, and therewith to pay his debts and legacies, then to the use, &c.; and he bequeathed a legacy of 500 *l.* to his nephew *T. P.*, to be paid at his age of 21, or marriage. The nephew *T. P.* died before the age of 21, and unmarried. His administrator claimed this legacy as being a vested interest, and transmissible. After a long argument, Lord *Hardwicke* said, that the only inducement he had to suffer so long a debate, was in order to receive satisfaction as to the point, which had been insisted upon in relation to this legacy being chargeable on a mixed fund, consisting of real and personal estate. He said, that was a difficulty which always stuck with him, and it was something very extraordinary, that the real estate which was only an auxiliary fund to the personal, should, in cases of this kind, be chargeable in a different manner, and not be

Hall v.
Terry,
1 Atk. 502.

Lord Hard-
wicke
speaking of
this case,
in the At-
torney-Ge-
neral v.
Tunstal,
says, there,
the whole of
the gift de-
pended upon
the time of
payment.

Prowse v.
Abingdon,
1 Atk. 482.

So, *Boycot v. Cotton*, 1 Atk. 555-6. in which the authority of *Jackson v. Farant*, 2 Vern. 424. and *Cave v. Cave*, *id.* 508. is denied.

(a) But surely the law is not so, nor ever hath been so. That executors or administrators shall have a writ of covenant for a personal thing, see *F. N. B.*

145. D. 146. D. Reg. 165. b. *Gols v. Nelson*, 1 Burr. 227.

Van v. Clarke, 1 Atk. 510.

made liable to the same rules and determinations with the primary security, the personal estate; but, he said, he found the resolutions so strong, that there was no difference between a charge on the real estate only, and a charge on the real and personal estate too; that he could not, at that time of day, think of determining in a different manner. He said, it was very clear, that charges on land, payable at a future day, could not be raised, if the party died before the day of payment; that there was no difference at all whether that charge was created by deed or will; nor, whether it was provided by way of portion for a child, or given merely as a legacy by collateral relations, or others; and this was the case in the *Duke of Chandos v. Talbot*, and *Jennings v. Looks*, in which he was counsel, for in neither of them was the provision made by a parent. That the true reason, why legacies charged on land, payable at a future day, shall not be raised, if the legatee dies before the day of payment, is, that the court will govern themselves, as far as is consistent with equity, by the rules of the common law. In the case of personal estate, the rule is the same here as in the civil law, that there may be an uniformity of judgments in the different courts: but in case of lands, the rule of the common law has always been adhered to: as, suppose a person should covenant to pay money to another at a future day, if the covenantee (a) dies before the day of payment, the money is not due to his representative. The same rule holds in a promise to pay money, &c.

M. C. devised to *G. C.*, his heirs, executors, and administrators, all that her messuage in *Great Lincoln's-Inn Fields*, with all her furniture, &c. and all her real and personal estate not otherwise disposed of, to the intent that, out of the said real and personal estates so devised, her several legacies might be paid. She then gave to *T. L.* 2000*l.* in trust for the use of his daughter *M.*, and declared that he the said *T. L.* should, until the said *M.* should attain the age of eighteen, or be married, which should first happen, place out the 2000*l.* at interest upon good security, and also should from time to time put out at interest, the interest of the said sum, as the same should arise to a fit sum for that purpose, and should pay the 2000*l.*, with the interest and produce thereof, to the said *M.* for her own use, upon her attaining her age of eighteen, or marriage; she likewise directed the 2000*l.* to be paid to *T. L.* the trustee, within one year and a half after her decease. *T. L.* died in the lifetime of the testatrix; *M.* died about half a year after the testatrix, unmarried. Lord Chancellour was of opinion, that, as the infant died before the time of payment to the trustee, the legacy was not raisable for the benefit of her representative. If she had survived the year and half, (for the death of the trustee made no difference,) she would have been entitled to the legacy; or, if she had died *after the term aforesaid*, and before eighteen, or marriage, her representatives would have been entitled: but if this had been merely personal, as she died within the year and half, her representative could not have been entitled, for the whole

whole gift is in the direction of the payment, which makes that the substance. In the present case, his Lordship said, it is not a legacy merely out of personal estate, but out of both funds, and the real charged in the first place, by the testator's express directions, viz. her estate in *Great Lincoln's-Inn Fields*. And this construction is more agreeable, as the sum was intended clearly as a portion for *M.*; and the court always goes as far as it possibly can to hinder the raising of portions out of land for the benefit of representatives.

A. S. (inter al.) gives to three trustees 8000 *l.* upon trust, that they should dispose thereof in the purchase of lands of inheritance in fee-simple, to be settled to the use of her grandson *T. M.*, and the heirs of his body; and for default of such issue, directed the trustees to convey the same to the Drapers Company, upon trust, that they should, within three months after the estate should be conveyed to them, by mortgage, or sale of some part thereof, raise and pay to *E. L.* her nephew 2000 *l.*, which she bequeathed to him, in case of the death of her grandson without issue. *E. L.* died in the lifetime of the grandson; and the grandson died a few years afterwards, under the age of twenty-one, and without issue. The question was, Whether this legacy of 2000 *l.* was lapsed, as *E. L.* died before the contingency happened, or, whether it was transmissible to his personal representative? The Master of the Rolls held, that it was lapsed: that the 8000 *l.* being directed to be laid out in land, must be considered in equity as land: that the testatrix herself considered it as land, because she directs the 2000 *l.* to be raised by mortgage or sale, which shews it must be out of land: that as the legacy therefore is to be paid out of real estate, it was within the general rule, and ought to sink in favour of the heir at law.

Attorney-
General
v. Milner,
3 Atk. 112.

Legacies were given to infants out of land (charged generally with debts) payable at twenty-one, with interest at 3 per cent. One of the infants dying before that age, Sir *L. Kenyon*, after great consideration, decreed, that the legacy lapsed.

Gawler v.
Stand-
wicke,
1 Br. Ch.
Rep. 106. note.

A testator gave legacies to his natural children, payable at the age of twenty-one, to be raised by the means thereafter pointed out: he then directed an estate to be purchased, a sum to be raised for maintenance of two of his natural children, upon whom he had settled the estate he directed to be purchased, and ordered the residue of the rents and profits of the said estate to be applied to raise the legacies, and in default thereof, made the estate liable. One of the legatees died an infant. Lord Chancellour said, he thought at first it was a mere personal legacy; but he doubted, upon the whole, whether it must not be considered as charged upon the land, the testator having referred to the manner in which it was to be raised, and having afterwards provided for the payment of it, by charging his real estate. The moment the money ought to be laid out in land, it must be considered as a real fund, and therefore the legacy fell within the general rule, and was lapsed.

Harrison v.
Naylor,
3 Br. Ch.
Rep. 103.

This rule however, that charges upon land payable at a *future* day, shall not be raised, where the party dies before the day of payment, is subject to many exceptions, as, where the time of payment is postponed from the circumstances, not of the person, but the fund.

Lowther v.
Condon,
2 Atk. 127.
130. Bar-
nard. Ch.
Rep. 327.
S. C.

A bequest ran in these words: "I give and bequeath unto each of my said daughters the sum of 1000*l.*, to be raised and to be paid unto them severally and respectively immediately after the decease of my wife, out of the rents, issues, and profits of my manors, lands, tenements, and hereditaments in *W.*, or by sale or mortgage of the same, or a competent part thereof, together with interest for the said several sums of 1000*l.*, after the rate aforesaid, from the decease of my said wife, until the said sums shall be duly paid to my said daughters, or their respective executors, administrators, or assigns: and my further will is, that in case either of my said daughters shall depart this life before me, then the survivor of my said daughters, her executors, administrators, and assigns, shall have and receive all and every the sum and sums of money herein by me before devised out of my said lands, to be raised in the manner hereinbefore appointed; and in such case, the part of the daughter so dying, shall not cease or sink into the estate for the benefit of my heir, but shall remain and be raised for the benefit of my surviving daughter." The testator died, and left one son *T.*, and two daughters, *D.* and *J.* In 1719, after the death of the testator, *D.* intermarried with Sir *W. L.*: *D.* died in 1736: *A.* the mother died in the year following: upon which Sir *W. L.* brought his bill against *T.* and *J.*, in order to have the sum of 1000*l.* mentioned in the will, raised out of the estate, which was thereby charged with it. Lord Chancellour held, that it ought to be raised: that the testator had postponed the raising of it till after his wife's decease, not from the circumstances of the person, but because it did not suit the circumstances of his estate, that it should be raised before: that the intention of the testator that it should vest, was shewn most strongly in the clause, where he gives the whole to the surviving daughter: that that intention was further manifested, by his using the words *executors, administrators, and assigns*, immediately preceding the clause of survivorship; for his meaning was, that in case the daughters should die before the portion was raised, the executors should be entitled to have the 1000*l.* raised off the estate. On the whole, his Lordship said, he thought the intention extremely clear under the will, that the portion should be raised, and that the postponing the time of payment was only for the convenience of the estate, because it would have distressed the son to have raised it in the mother's lifetime, before her jointure fell in.

King v.
Withers,
Ca. temp.
Talb. 117.
3 P. Wms.

J. S., having a considerable real and personal estate, devised as follows: "I give and bequeath unto my daughter *M.*, at her age of twenty-one, or day of marriage, which shall first happen, the sum of 2500*l.*; and my will and meaning is, that if my son

“ *A.* should die without issue male of his body then living, or
 “ which may afterwards be born, that then my said daughter
 “ should have and receive at her age of twenty-one, or day of
 “ marriage, which shall first happen, the further sum of 3500*l.*,
 “ over and above the said sum of 2500*l.*; but in case the contin-
 “ gency of my said son’s dying should not happen before the said
 “ age of my daughter, or her day of marriage, that then she shall
 “ receive and be paid the sum of 3500*l.* whenever it may after
 “ happen.” Then he devises his real estate to his son in tail, and
 for want of such issue remainder to his brother in fee; and then
 goes on thus: “ And my will and meaning is, that the lands and
 “ premises hereby devised shall be liable to, and chargeable with
 “ the payment of the said sum of 3500*l.*, whenever it shall be-
 “ come due and payable;” and directs, that in case of failure of
 issue of his son, his daughter, her heirs or assigns, should join in a
 surrender of some copyhold lands to the use of his brother, other-
 wise the legacy of 3500*l.* to become void.—The daughter mar-
 ries, having attained her age of twenty-one, and dies in her bro-
 ther’s lifetime, leaving the plaintiff, her husband, who took out ad-
 ministration to her, and then her brother dies without issue male.—
 The question was, Whether the legacy of 3500*l.* should be raised
 out of the land, the personal estate being deficient; and whether
 it was such an interest in her as would go to the plaintiff, her ad-
 ministrator? Lord Chancellour said, that three things were by the
 will necessary to happen, to entitle *M.* to this legacy of 3500*l.*,
viz. the death of *A.* the son without issue male; marriage, or her
 attaining the age of twenty-one; and that all three had happened;
 and that though it is to be raised out of land, it remains money
 still; and though she has not lived to receive it, yet, the contingency
 having happened, it must go to her husband, who is her repre-
 sentative, and who may well be thought to have married in con-
 templation of this additional fortune of 3500*l.*, though depending
 upon a contingency.

414. S. C.
 4 Br. P. C.
 228. S. C.

T. H. devised copyhold lands to his wife and her assigns for her
 life, and after her decease to his son *S.*, till his grandson, the de-
 fendant *T.*, attained the age of twenty-three; and no longer; and
 so soon as his grandson attained that age, then he gave them to his
 said grandson, his heirs and assigns for ever, on condition that the
 said grandson, his heirs or assigns, should pay or cause to be paid
 to his grand-daughter *E. H.* the sum of 60*l.* within two years af-
 ter his said grandson attained his age of twenty-three; and if his
 said grandson should happen to die without issue of his body, then
 he gave and devised the same to his son *S. H.* and his heirs, on
 condition of paying the sum of 100*l.* to *E. H.* within one year
 after his son *S. H.* enjoyed the said premises by virtue of this last
 devise; and his will further was, that if his said grandson or son
 should make default in payment of the said sum of 60*l.* then it
 should be lawful for his said grand-daughter *E. H.*, her executors
 and administrators, to enter into the said premises, and the rents
 thereof to receive and take till the 60*l.* should be paid.—*E. H.*
 married the plaintiff, and lived till after the defendant, her bro-
 ther, attained his age of twenty-three, but died before the two

Ernes v.
Hancock,
 2 Atk. 507.

years were expired after his attaining that age. It was decreed, that the 60*l.* was a vested legacy, and transmissible to *E.*'s representative: that the testator so appointing two years after his grandson attained twenty-three, for raising the 600*l.*, seemed to be done merely *for the convenience of the estate*: that if *T.* the grandson had died within the two years, (for if he had died after, *E.* would have been entitled only to the 60*l.*) and the money had not been paid, and he had left a son, and the son had likewise died within the two years, and then *E.* had died before the year was out which the testator had allowed to *S. H.* for payment of the 100*l.*, *E.*'s representative would clearly have been entitled to the 100*l.*: that the case of *King v. Withers*, *supra*, was directly in point for that purpose; and thence it might be argued, that it was the intention of the testator, that his grand-daughter *E.* should have one or the other. The devise was further considered as a conditional limitation, and therefore whatever right *E.* gained thereby was a legal estate.

Sherman v.
Collins,
3 Atk. 319.

A testator bequeathed unto each of his daughters *A.* and *M. C.* 300*l.*, to be paid them by his executor *J. C.* when he should attain his age of twenty-six; and then went on thus: "but in regard
"my two daughters are already provided for by lands settled on
"them by me, and my late wife, and by legacies left them by
"their grandfather, and which I have paid to them; it is my in-
"tention, that they shall not be entitled to any interest (a) for
"the said sums to them given by me as aforesaid: however, for
"the better securing the said several sums of 300*l.* given to my two
"daughters, my will is, that my two closes in *S.* shall stand
"respectively charged with my personal estate, and be liable
"to the payment of the said several sums of 300*l.* to my two
"daughters at the time above-mentioned, with a power to enter
"and hold till payment of principal and interest, from the time
"it shall become due;" and after the payment thereof he devised the premises to his son *J. C.* in fee, whom he makes executor and residuary legatee. Both the daughters arrived at their age of twenty-one, but died before *J. C.* attained his age of twenty-six: one of them married, and left two children; the other died unmarried, but by will gave the 300*l.* to her sister. Lord *Hardwicke* held these to be vested legacies; for that the time of payment was postponed, in order to prevent the burden of interest from falling upon the estate of the son till he attained his age of twenty-six. Besides, upon general rules of law, the legacies are vested, for the persons entitled might have had a legal remedy by ejectment. The words are, *with a power to enter and hold till payment*. This is a right of entry given them to hold the land in the nature of a tenancy by *elegit*, and is a chattel interest. The charge is not an equitable charge, but a legal one.

(a) These words, Lord Camden observed, operated as words of gift.

Hutchins v.
Foy, Com.
Rep. 716.

A testator devised all his real and personal estate to *T. B.* for life, and afterwards to his children, and for want of such issue, to his sister *Martha* for life, and after her decease, to *J. B.* for life, and then to his children, and for want of such issue, part of his real estate called *M.*, to *W.* and his heirs; the other part called *C.*, to the defendant *Foy* and his heirs, paying out of it, when it falls, 500*l.* viz. 100*l.* to *S. D.*, 150*l.* to *W.* and *O.*, 100*l.*

to *N.*, and 50 *l.* a-piece to *Elizabeth*, *Mary*, and *Margaret*, the three daughters of his sister. *J. B.* died without issue, and his sister *Martha* died in his lifetime. *Margaret*, one of the three daughters, married the defendant *G.*, and died two years after the testator. *T. B.* died without issue two years after *Margaret*, whereby the defendant *Foy* came to the possession of the estate devised to him and his heirs. The defendant *G.* having taken out administration to his wife *Margaret*, assigned to the plaintiff the 50 *l.* payable to his wife; and the question was, Whether this legacy was vested in *Margaret*? The court held that it was; for first the remainder vested immediately by the death of the testator; for *Foy* might sell or devise it, and, consequently, the 50 *l.* is vested in those to whom it was payable; for if he had sold it, it must have been subject to the charge laid upon it by the testator. And farther, the estate and the charge upon it pass together, and the devisee must take it *cum onere*; for as it was the testator's intent that *Foy* should have the estate, it was as much his intent, that he should pay the money out of it when he had it.

J. H. devised part of his real estate for payment of debts, the surplus to his mother, and another part to his mother for life; and afterwards to *W. R.* his heirs and assigns; he and they paying thereout legacies to several persons, which sums he willed to be paid within 12 months next after his mother's decease, charging his land therewith accordingly. After the testator's death the mother entered, and possessed the real estate, and died. A legatee of 100 *l.* survived her but a month, and his executors bring a bill for the legacy against the devisee of the real estate, who was not the heir at law. Lord *Hardwicke* held, that it was a vested legacy, and transmissible to the representatives; that the twelvemonth clause was not intended to suspend the vesting, and make it contingent; but only as a reasonable time to the devisee for payment, which he could not do before he was possessed. And his Lordship cited the following case of *Wilson v. Spencer*, Jan. 31, 1732, which was determined on that ground only. There, the testator directed the payment of his debts and legacies by and out of such part of his personal estate, as should not afterwards be specially devised; and if that proved deficient, then out of the real estate; and that his executor should within 12 months after his death levy and raise sufficient to pay 1000 *l.* to his younger son, to be paid to him immediately when raised, charging all his real estate, if the personal estate not specifically devised proved deficient. The younger son died before the expiration of the year: his executors bring a bill for it against the eldest son, the devisee for life of the real estate, with a remainder to his sons. The defendant admitted it was intended for the brother's advancement; but insisted, that he dying unmarried before it was extinguished, and not to be raised; the personal estate was admitted to be deficient, and it was therefore chargeable on the real estate, and to take the fate out of real estate. The court held, it should be raised, which is an authority, that the year for raising was not sufficient to prevent the legacy from vesting. Upon the authority of *Wilson v. Spencer*, his Lord-

Hodgson
Rawson,
1 Vcz. 44.

ship held, that the legacy in the principal case should be raised and paid with interest at 4 *per cent.* from a year after the mother's death, and that the plaintiff must have his costs.

Thompson
v. Dow,
1 Br. Ch.
Rep. 193.
note. See
Manning v.
Herbert,
Ambl. 575.
S. P. upon
nearly the
same words.

A testator, seized of the reversion of an estate, expectant upon the decease of his aunt, devised this estate to his wife for life, remainder to *J. D.* in fee; subject to the payment of 200 *l.* to his daughter *E.*, six months after his wife's decease; with power for the daughter in default of payment to seize the rents. *E.* died in 1750; the mother in 1754; the aunt in 1760. Lord *Northington* held this a vested interest in the daughter, and decreed the 200 *l.* to be paid with interest from the decease of the aunt, it appearing, from the words of the will, that the son was to pay this 200 *l.* out of the rents of the estate.

Tunstall v.
Brachen,
Ambl. 167.
1 Br. Ch.
Rep. 124.
note, S. C.

A. devised lands to *M. B.* his sister, in fee, paying 100 *l. per annum* to his wife for her life, and also several legacies to several of his nephews and cousins within 12 months after the death of his wife, with a proviso, that in case his wife should at his death have a child or children who should live to 21, he revoked the devises and bequests, except the annuity to his wife, and gave all his said lands, &c. to such child or children, his, her, or their heirs. Several of the legatees died in the lifetime of the wife, who had no child at the testator's death. It was decreed that their legacies were transmissible to their representatives.

Embry v.
Martin,
Ambl. 250.

W. N. devised his freehold estates to his son *J.* in tail, remainder to his daughter *P.* in tail, remainder to his daughter *E.* for life, remainder to her son *J. N.*, and his heirs for ever, upon condition of his paying to his eldest sister, the plaintiff's mother, 100 *l.* at or soon after his being possessed of the premises, and for non-payment the estate should be to the plaintiff's mother, &c. *J., P.,* and *E.* are all dead; the plaintiff's mother is also dead; and since her death, the remainder in fee is vested in *J. N.*, in possession. The plaintiff, as his mother's executor, is entitled to have the 100 *l.* raised.

Jeal v.
Tickener,
1 Br. Ch.
Rep. 120.
note.

H. S. devised two houses to his wife for life, and immediately after her decease, to the defendant in fee, he paying thereout to the testator's cousins *H. T.* and *T. T.* 20 *l.* a-piece, within three months after the death of his wife. The testator died in 1752, and his wife entered. *T. T.* survived the testator, and by will gave the legacy to the plaintiff *Jeal*, but appointed no executor. The plaintiff *Jeal* obtained administration. *H. T.* survived the testator, and died in 1753 intestate. The testator's widow died in 1767, and *E. T.* entered. It was insisted by the defendant, that as *T. T.* and *H. T.* died in the life of the wife, the legacies were not payable. But, Lord *Bathurst* declared, that they were vested, and transmissible to their representatives, and a charge upon the premises devised to *E. T.*

Clarke v.
Rofs, *ibid.*

A testator devised real estates to trustees, to the use of *T. S. M.* for life, remainder to trustees, &c., remainder to his first and other sons, in tail general, remainder to daughters in tail general, remainder to his wife for life, remainder to *A. W.*, his heirs and assigns for ever, with a proviso, that *A. W.*, or his heirs, if he or they

they should actually come into possession by virtue of the limitation in the will, should pay to his daughter *E. W.* 2000 *l.*; and he thereby charged all the premises with the payment of the 2000 *l.* to the said *E. W.*, at the end of two years next after the said *A. W.* or his heirs should come into possession as aforesaid. After the death of the testator, a commission of bankruptcy issued against *A. W.*, under which the defendant was chosen assignee. *T. S. M.* and the testator's widow both died, the former without issue; upon which the reversion in fee-simple vested in the defendant, who entered and enjoyed two years. *E. W.* died in the lifetime of *T. S. M.* and the testator's widow. Lord *Bathurst* nevertheless decreed the legacy given to her to be raised with interest from the end of two years after the defendant came into possession.

By a clause in the will of Sir *J. K.*, he gave, in case his nephew should depart this life before he should attain the age of 21, the several additional legacies hereafter mentioned, viz. to his wife 2000 *l.*, to his sister *J. B.* 1000 *l.*, to his sister *M. S.* 1000 *l.*, to his sister *E. K.* 1000 *l.*, and he directed those several legacies should be paid and payable within six months next after such the decease of his said nephew under the age of 21 years, and directed and empowered his trustees, their heirs, and assigns, to raise those additional legacies by any mortgage or mortgages of the whole or a competent part of his estates thereby devised to them. The nephew died unmarried, under the age of 21. The question was, Whether as these legatees, though they survived the testator, died in the lifetime of the nephew, their personal representatives were entitled to the additional legacies given them on the contingency of the nephew dying under 21? The court held, that they were vested interests, and transmissible to the representatives.

Kemp v. Davy, ibid.

A testator devised real estate to his wife *T.* for her life, remainder to his son *R.* in tail male, remainder to his (the testator's) right heirs in fee, upon condition that *R.*, or those then in possession of this estate, should, within six months after the death of testator's wife, pay to his two daughters *M.* and *T.* 1200 *l.*, viz. 600 *l.* to each, and interest at 5 per cent. from the death of their said mother, with power of entry to the daughters in default of payment: the daughter *T.* survived the testator, but died in the lifetime of her mother: *M.* the other daughter administered to her sister, but died without claiming the 600 *l.* in her right. The personal representative of the daughters brought a bill against *R.* as heir at law and devisee of the testator for this sum of 600 *l.* bequeathed to *T.* the daughter, with interest from the mother's death; and upon the authorities of *Hutchins v. Foy*, and *Hodgson v. Rawson*, (both *supra*), Lord *Bathurst* determined, that the charge vested with the land, and decreed for the plaintiff.

Pawsey v. Edgar, 1 Br. Ch. Rep. 192. note.

H. P. devised his estate to his wife for life, remainder to his daughter *M.*, and her heirs for ever, chargeable with 400 *l.* to his four younger daughters, within one year after the death of his wife, with interest from the death of his wife. Two of the younger sisters died in the lifetime of the mother unmarried; the eldest daughter also died in her mother's lifetime, so that she was never possessed of the remainder in fee of the estate, but it descended

Morgan v. Gardiner, 1 Br. Ch. Rep. 193. note.

scended to her only son. It was holden in the Exchequer, that the legacies to the younger daughters were vested interests, transmissible to their representatives.

Dawson v.
Killet, 1 Br.
Ch. Rep.
119.

R. M. devised an estate to his wife for life, and if there should be no issue between them, then to the defendant, charged with 100 *l.* to *W. R.*, and 100 *l.* to *M. B.*, to be paid within six months after the decease of his wife. Afterwards, *M. B.* being dead, the testator by a codicil, reciting, that she was so, gave 50 *l.* of that 100 *l.* to *W. R.*, and 50 *l.* thereof to *A. B.*, to be paid at the time when *M. B.* would have been entitled to receive it, if she had lived. *W. R.* survived the testator, but died in the lifetime of the wife, making the plaintiffs his executors, who, after the decease of testator's wife, filed their bill for the sums of 100 *l.* and 50 *l.* Lord *Thurlow* said, that this was a devise after the death of the wife to the defendant, and the testator charges the estate of the defendant (meaning the interest of the defendant in the estate) with the sums in question, which distributes the estate between the defendant and the legatees. Upon the death of the testator, the remainder vested in the defendant, and the moment it vested in the defendant, the charges vested in those to whom they were given. The legacies therefore of 100 *l.* and 50 *l.* must be raised for the plaintiffs, with interest from six months after the death of the wife.

Goodwin v.
Munday,
1 Br. Ch.
Rep. 191.

J. M. devised an estate to his second son *J.* and his heirs for ever, after the decease or marriage of his (the testator's) wife *E.*, with a proviso, that he should pay to the testator's daughter *Mary* then the wife of the plaintiff, and since deceased, the sum of 100 *l.*, and unto *Martha* 80 *l.*, to be paid within one year after the death or marriage of his wife. *Mary* died in the life of her mother. Lord *Thurlow* held the legacy vested.]

(F) Of Conditional Legacies, and how far the Condition must be complied with, otherwise the Legacy will be forfeited.

2 Vern. 91.

(a) If the lord of a copyhold manor come

to a copy-

holder, and require him to do his services, and the copyholder answer, if they are due, he will do them,

but it shall be tried at law first, whether they are due or not ; this is no forfeiture, being no wilful refusal. Roll. Abr. 506. Roll. Rep. 429. 3 Bulf. 80. 268. 4 Co. 21. b.

ful. Roll. Abr. 506. Roll. Rep. 429. 3 Bulf. 80. 268. 4 Co. 21. b.

IF a legacy be given on condition not to dispute the will, and the legatee commence a suit, whereby he disputes the validity of the will, yet this is no (a) forfeiture of the legacy, if there was *probabilis causa litigandi*.

But what we are here chiefly to consider is, how far conditions, annexed to legacies which restrain marriage, are to be performed, and how, and in what case, the neglect or non-performance of them will forfeit the legacy.

Sainb. 166.

And here we must observe as a general rule, that all conditions in restraint of marriage are to be considered strictly, being prejudicial to society, as they hinder the propagation of the species.

Therefore

Therefore by our law, as also by the civil law, a devise upon condition not to marry, or not to marry a person of such a profession or calling, is void, whether there be a limitation over, or not; for (a) every person ought to be at liberty to marry when he pleases; and therefore conditions restrictive of that power are against law, and void.

bequeathed by a man to his wife for so many years, if she shall remain a widow so long, this is a good conditional bequest, because of the particular interest every husband has in his wife's remaining a widow; for thereby she will the better take care of the concerns of his family, in respect of which he may well allow her a maintenance for that time, to cease when she removes herself into the interest of another family. Godolph. Orph. Leg. 45. — But if a stranger gives a legacy upon such condition, it is not good; for there is no more reason for restraining a widow from marrying, than a maid. Godolph. 46. — Where a man devised, after debts and legacies paid, the surplus of his estate to his wife and his son John, equally betwixt them, and adds, *whom I make my executors*, and farther wills, that she should continue his true widow; but if she marry again, *my will is, she shall render the right of being my executrix to my son Roger, to be partner with his brother John in the executorship*; it was held, that by the wife's marrying again, she had as well lost her share of the surplus, as her right to the executorship. 2 Vern. 308. Barton v. Barton.

Godolph.
Orph. Leg.
45.
Swinb. 266.
Vern. 20.
Mod. 86.
(a) If an
annuity be

Also, by the civil law, a gift or devise upon condition not to marry without (b) consent is void, though there be a limitation over; for the maxim there is, *matrimonium debet esse liberum*.

legatee, upon condition he marry with the consent and approbation of another, and if he marry against their consent, that the executorship or legacy shall go to another; yet he shall have the executorship or legacy: But in this case it is said, that he is bound to ask consent, and to marry; for both these parts of the condition are lawful, though the part is not, that restrains him from marrying against the consent of another. Godolph. 46.

Swinb. 267.
(b) If one
be appointed
executor or

But though conditions which restrain marriage generally are void, yet both by our law and the civil law, a condition, that restrains marriage as to time, place, or person, is good; as not to marry before twenty-one, not to marry at York, not to marry a papist, &c.

But the prevailing distinction in the courts of equity as to this matter is, between such conditions as are good, and bind the legatee, and such as are only *in terrorem*; as to which it is clearly agreed, that if a legacy be given to a person upon condition that he or she marry with the consent of J. S., that in such case the condition is only *in terrorem*, and the legatee does not forfeit, though the marriage was without such consent: but if in this case the legacy had been limited over to another, the marriage without consent had been a forfeiture. And the reason thereof is, not only from the intention of the testator appearing more strongly in the latter, than in the first case, but also because the courts cannot in this case relieve against the forfeiture, without doing an injury to the person to whom it is limited over (c).

Swinb. 267-
8. Vern. 20.
2 Br. Ch.
Rep. 483.

forfeiture, were not limited over, yet the parties themselves might not be so learned, and therefore it would be some terror to them to venture to break it; and without this distinction, strangers, executors, might run away with a great part of a man's estate from his children. [(c) Hence, if in the event of a marriage without consent, the legacy or portion be given over, a demurrer will lie to a bill for a discovery of the fact of the marriage. Chauncey v. Tahourdin, 2 Atk. 392. Chancey v. Fenhouliet, 2 Vez. 265.]

2 Chan. Ca,
22. 138.
Vent. 199.
Vern. 20.
2 Vern. 293.
5 Vin. Abr.
343. pl. 41.
Atk. Rep.
502. Pre-
ced. Chan.
565. the
famed distinc-
tion; and
there said,
that though
a lawyer
may know
it to be no

[This distinction as to the legacy being given over or not, it is true, does prevail in our courts of equity, and may in general enable us to decide on the validity of any condition of marriage, where the gift or legacy, to which such condition is annexed, is charged upon personal estate. But where the gift is of real estate,

or

or charged upon real estate, in that case, it becomes material to consider whether the condition be precedent or subsequent, for interests arising out of land must be governed by the rules of the common law. If therefore such condition of marriage be precedent, it must be strictly performed, in order to entitle the party claiming to the benefit of the gift.]

1 Chan. Ca. 58. Fleming and Waldgrave. 2 Vern. 573. S. C. cited; and there said, that there may be a difference between a condition that a person cannot marry without consent, and where it is that the party shall not marry against consent. [So, by Lord Hardwicke in 3 Atk. 335. As to this case of Fleming v. Waldgrave, it was said by the Attorney-General, and agreed by the Master of the Rolls in Reeves v. Herne, *infra*, that the legacy, *here*, vested immediately. it being given upon her not marrying without consent, &c.; and his Honour remembered a like case in the time of Wright, S. C. where the condition being, if she did not marry with consent, &c. the legacy was decreed her immediately, she entering into a recognizance to refund, in case she married without consent, &c. A testator gave his grand-daughter 200*l.* on condition she continued with his executors till she was twenty-one; but if she was taken from them by her father (who was a papist), or married against the consent of his executors, then he gave her but 10*l.* The grand-daughter was placed by his executors with a clergyman, who, before she was twenty-one, with consent of one of the executors, permitted her to make a visit to her father, who took that opportunity to marry her to a papist. She was decreed the legacy, at the Rolls; but upon a re-hearing Lord Keeper held, that she should have only the 10*l.*; and he said, that in this case there was no difference between a condition that she should not marry without consent, and that she should not marry against consent. Creagh v. Wilton, 2 Vern. 572. *Qu.* Whether there was any limitation over?] 41.

Vent. 199. Mod. 300. 1 Chan. Ca. 138. Fry and Porter. See also Bertie v. Lord Falkland, *supra*, vol. i. 643. If *A.* devise a messuage, &c. to *B.* his wife for life, remainder to *C.* his grand-daughter in tail, upon condition that she marry with the consent of his wife and *D.* and *E.*, or the major part of them, and if she marry without their consent, or die without issue, the same to remain to *F.* and her heirs; and *C.* marries without the consent of any of them, who, as soon as they hear of it, declare their dislike to the marriage, but afterwards consent to it; yet *C.* shall not be relieved in equity, for the subsequent assent cannot divest the estate which was before vested in *F.*, neither can there be any collateral averment that the condition was intended only *in terrorem*.

Reeves v. Herne, Vin. Abr. tit. Condition, (Z. d), pl. 41. [J. S. charged his real estate with 500*l.*, to be paid his sister Alice Herne within one month after her marriage, but so nevertheless as she married with the approbation of his brother Joseph Herne, (if living,) and in case she married without his consent, the 500*l.* were not to be raised. Alice Herne married in the lifetime of Joseph Herne, and without his consent, and the question was, Whether she was entitled to the 500*l.* or not? For here, it was said, that this was a condition only *in terrorem*, and that the construction of such conditions had always been, that where there is no devise over, such condition is void; otherwise, where limited over; and here it is not. On the other hand, it was argued, that this is a condition precedent, and nothing arises or becomes due but upon the marrying with consent; and this being a devise of money out of land, or of a charge upon the land, it is to be considered

dered as a devise of land, and governed by the same rules; and then being a plain condition precedent, nothing can arise; and for this were cited the cases of *Fry v. Porter*, and *Bertie v. Lord Falkland*. The Master of the Rolls said, that the civil law makes no distinction in *personal* legacies, between conditions precedent and subsequent; neither does this court as to mere *personal* legacies given upon condition of marrying with consent. But this court differs from the civil law in this; that whereas by that law all conditions in restraint of marriage are void, this court says, they are not void, where the legacy is given over, and another person particularly substituted by the testator to have the benefit of it, in case the condition be not complied with. But this must be a special nomination as a legatee; and therefore a residuary legatee or executor shall not have the benefit of such non-performance. And his Honour remembered a case to this purpose, where on a legacy given upon condition of marrying with consent, and if not, to sink into the residue of testator's estate which he gave to *J. S. &c.*, it was holden, that though the marriage was without such consent, yet, it was not lost, because it would have been the same if the testator had said nothing about its sinking into the *residuum*, and therefore was construed only *in terrorem*. So it is in the case of a trust of a term limited of lands for raising portions with such restriction, this court governs itself by the same rules as in case of a devise of a legacy with such condition, because though the term be a legal estate and interest, yet the trust of a term is a creation of equity only. But it is otherwise in case of a devise of lands; there, conditions precedent and subsequent take place. And this was *Fry and Porter's* case of an infant bound by condition relating to her marriage, it being a condition precedent: and the present case being a charge upon land, is to be governed by the same rule, and is to be considered as land; the will must be attested in the same manner; and this being plainly a condition precedent, and nothing vested, (as it is in the case of a trust-term, where the term is vested, and the trust only left open,) it is too hard for this court to charge the land contrary to the express will of the testator; and to say the money should be raised, when the testator has said it shall not: and a charge upon the land cannot arise otherwise than as a devise of the land itself.

*Sed vide
infra contra*

A. by settlement after marriage created a trust-term of 100 years by mortgage or sale to raise 2000 *l.* for the portion of each of his daughters, provided they married with their mother's consent, and directed a yearly payment out of the rent till they married; and if any of them died before marriage with such consent, her portion was to cease, and the estate was to be exonerated thereof; or, if it were raised, it was to be paid to the person to whom the estate should belong. By will, he created another trust-term to raise by sale or mortgage 4500 *l.*, whereof 2000 *l.* were to be paid to each of his daughters, in augmentation of their fortunes, subject to the conditions in the settlement; and by a codicil (in pursuance of a power of revocation,) he created another trust-term for the better raising of his daughters portions. *A.*

*Hervey v.
Aston, Ca.
temp. Talb.
212. 1 Atk.
361. S. C.
Com. Rep.
726. S. C.*

died.

died. The daughters married without consent. The Master of the Rolls held, that the portions should be raised, the husband making a competent settlement. But this decree was reversed by Lord Chancellour *Hardwicke*, assisted by Lord C. J. *Lee*, Lord C. J. *Willes*, and *Comyns*, J., for they considered portions or interests directed to be raised out of land, as having nothing testamentary in them, and that they were therefore not to be governed by the rules of the civil or canon law, but by those of the common law: that, in that law, no rule was more fixed, than that portions charged upon land did not vest till the time of payment arrived; and that the present condition to marry with consent was a lawful one, and a condition *precedent*; and that being such, nothing vested in the daughters until that condition was performed.

Reynish v.
Martin,
3 Ark. 330.
1 Will. 130.
S. C.

E. P. devised her real estate to her daughter *Martha* and her heirs for ever, subject to such charges as should afterwards in her will be expressed: then follows this clause: "Provided always, and it is my will, that if my daughter *Mary* marry by and with the consent of the trustees (therein named), or the major part of them, and signified in writing before such marriage had, then, and not otherwise, I give and devise unto my said daughter *Mary* the sum of 800*l.*; and it is my will that my said daughter *Martha* shall pay unto my said daughter *Mary* the sum of 30*l.* yearly, during the said *Mary's* continuing sole and unmarried, by 15*l.* each *May-day* and *All-Saints-day*. And I do hereby charge all my aforesaid real estate with all my debts and legacies of all kinds." *Martha* and *Mary* survived the testatrix. The latter married the plaintiff without the consent of the trustees. Upon her death, the plaintiff, as her representative and administrator, filed a bill for an account of the personal estate, and that the same might be applied in payment of the said legacy of 800*l.*, and so much of the arrears of the annuity of 30*l.* *per annum* as were due to *Mary* before her marriage; but in case the personal estate should not be sufficient, that then the real estate, or so much thereof as would make good the deficiency, might be sold, and the money arising therefrom applied for that purpose. Lord Chancellour said, that the real estate was not originally charged with this legacy, but only as auxiliary in failure of the personalty; and the charge upon the lands depended upon a condition precedent, which never was performed; that this could not be considered as a legacy charged, or chargeable upon the real estate, but as a mere personal legacy, and as such, was to be governed by the rules of the civil and canon law. He therefore directed, that the plaintiff be paid the arrears of the 30*l.* *pro rata*, till the time of the marriage; and in case the personal estate should be exhausted by the payment of debts or other legacies, that the plaintiff should stand in the place of such creditors and legatees *pro tanto*, as had received satisfaction, and that so much of the real estate should be sold, as would be sufficient to satisfy the legacy of 800*l.* and the arrears of the annuity.

Randal v.
Payne,
1 Br. Ch.
Rep. 55.

A testator gave to trustees 4000*l.* for the use of *J. W.*, if she married with consent; if not, then only 1000*l.*, and a similar legacy

legacy to the use of *M. W.*: then followed this clause: "If either of these girls should marry into the family of *G.* or *R.*, and have a son, I give all my estate to him for life," (with remainder over); "if they shall not marry, then I give all my estate to *Randal*." A bill was filed, and there was a decree that the money should be invested in the funds till the event should happen, with leave for the parties interested to apply, as occasions should arise. The girls being married with consent, but neither of them into the families of *R.* or *G.*, *Randal* filed his bill for the residue, as forfeited to him. But, by Lord *Thurlow*—Nothing could vest till they married, marriage being a condition precedent: then can any thing vest till the whole condition becomes impossible? The plaintiff supposes, that if the girls once married, they had lost all chance of marrying into the family of *R.* or *G.* If the testator had said so, it would have been very well. Suppose one of them, after the death of her husband, to marry into one of the favoured families, and to have a son, who comes here to claim the estate: the court would not incline to refuse him. The decree that the money should be invested, &c., must be carried into execution.]

A. devised 300 *l.* to *B.* her daughter, and that if she married under 21, without consent of the executors, or the major part of them, the legacy to go to the children of her sister, the wife of *C.*, and made *C.* and two others executors; *B.* being at the house of *C.*, there marries his son, by a former wife, with his privity, being under twenty-one; *B.* and her husband bring a bill for the legacy, *C.*, in favour of his other children, insists, that the legacy is forfeited; the other executors confessed they had notice of the courtship, and did not contradict or disapprove of it, and the 300 *l.* were decreed the plaintiffs, there being at least a tacit consent.

Vern. 580.
Mifgret v.
Mifgret.

[A father devised lands in trust to permit his daughter *S.*, to receive the rents until her marriage or death, and in case she married with the consent of the trustees, then to convey the premises to her and her heirs; but if she died before marriage, or married without such consent, then to convey to other persons. The daughter afterwards married with the consent of her father, who settled part of the lands on her and her husband, and died. By the father's consenting in his lifetime the condition is dispensed with.

Clerk v.
Berkley,
2 Vern. 720.

A legacy was given to a daughter with a condition annexed to it, that she should marry with her mother's consent. The daughter sued for the legacy, and it was pleaded in bar, that she did not marry with her mother's consent; notwithstanding which, sentence was given in her favour, that she should have the legacy.

Pigot's case,
cited in
Moor, 857.

The plaintiff's bill was for 400 *l.*, left her to be paid at her age of 21, or day of marriage, so as she married with the assent of the trustees, and her mother, and eldest brother. The defendant insisted, that the plaintiff was about to marry without such assent, and refused payment. But the court declared it just and reasonable, that the said 400 *l.* with damages should be paid to the plaintiff.

Norwood v.
Norwood,
1 Ch. Rep.
65.

Vintner v.
Pix, 1 Ch.
Rep. 65.

R. P. bequeathed to his two daughters *Eleanor* and *Alice* 200 *l.* a-piece, to be paid at their ages of 21 years, or days of marriage, and he also gave them 200 *l.* more by a marginal note in his will, with this clause, "*if they behave themselves dutifully to their mother.*" *Alice* died, and *Eleanor* administered to her, and married the plaintiff without the consent of the defendant her mother, who was executrix of her father's will. The court of Chancery declared, that as to the 200 *l.* positively given by the will, the defendant ought to pay the same to the plaintiff; but as to the 200 *l.* given by the marginal note in the will upon their dutiful behaviour to the defendant, she having married herself without the consent of her mother, they referred that point to the judges. The judges certified, that the 200 *l.* mentioned in the marginal note, as well as the 200 *l.* in the body of the will, belonged to the plaintiff *Eleanor*, her marriage notwithstanding.

Bellasis v.
Ermine,
1 Ch. Ca.
22.

A suit was for a portion of 8000 *l.*, given to the plaintiff's wife. The defendant pleaded, that it was given her, provided she married with the consent of *A.*, and if not, that she should have but 100 *l.* *per annum*; and that she married without the consent of *A.* It was ordered, that the plea stand over-ruled. And the court all declared this proviso was but *in terrorem*, to make the person careful, and that it would not defeat the portion. But it was said, that if the party who gave the portion, had limited it to another, in the case of her marriage without the consent of *A.*, there, it would have been otherwise.

Sutton and
Wife v.
Jewke,
2 Ch. Rep.
50.

A sum of 1500 *l.* was to be put out at interest for the use of the plaintiff *Anne*, and the principal and proceeds thereof were to be paid to her at her age of 21, or marriage; but if she should marry without the consent of the defendant *Jewke* and his wife, her father and mother, or one of them, or the survivor of them, then 500 *l.*, part of the said 1500 *l.*, was to be paid to such person, as the defendant *Jewke's* wife, by writing under her hand, and without her husband, should appoint. The plaintiffs filed their bill for the 1500 *l.*, stating, that the defendant *Jewke's* wife died in 1668, without making any appointment, so that the plaintiff *Anne* was become entitled to the whole 1500 *l.* and the proceed thereof. The defendant *Jewke* insisted, that *Mary*, his wife, died in 1670; but, before her death in 1666, by deed poll directed, that in case the plaintiff *Anne* married without the consent of her, the said *Mary*, or the defendant *Jewke*, her husband, then 500 *l.* part of the said 1500 *l.* was to be paid to her and the defendant, or the survivor of them, and that the said deed was made upon mature deliberation, to keep the plaintiff *Anne* in due obedience; that the plaintiff *Sutton* having in a clandestine manner married the plaintiff *Anne*, without the defendant's privity and consent, and after he had forbidden his daughter to marry him on the forfeiture of his blessing, or what otherwise she might expect from him, he the said defendant, by means thereof, and by being administrator to his late wife, became entitled to 500 *l.*, part of the said 1500 *l.* The question therefore was, Whether the plaintiff

Anne

Anne was entitled to the whole 1500*l.*, or, whether she had not forfeited 500*l.* thereof by her marriage without her father's consent and privity, and contrary to his direction and advice? Lord Chancellour was fully satisfied, that the plaintiff *Anne's* marriage was without the defendant's privity, and against his consent, and that therefore she could not have the 500*l.*

A sum of 500*l.* was bequeathed to the plaintiff's wife, if she married with the consent of certain trustees; and in case she did not, then 20*l. per annum* for her life. She married the plaintiff without the consent of the trustees, and he preferred his bill for the 500*l.* It was urged on behalf of the defendant, that this differed from the common case of a devise on a condition *in terrorem*; for it had always been holden, that where there is a devise over to a third person for non-performance of the condition, there, if the party marry without consent, all shall go to the third person, because he hath a conditional interest by the will; but if there be no devise over, then it is esteemed only *in terrorem*, and the party shall have the legacy, notwithstanding the breach of the condition. But here, that this is tantamount, or as strong as a devise over, when the party himself saith, that if she marry without consent, she shall have but 20*l. per annum*. But it was answered by Lord Chancellour, that this differed not from the reason of the common case of a devise *in terrorem*, and the reason, he said, he had from the Lord Chief Justice, (*Hale*,) who (when it was objected in another case in this court, that this court did not make men's wills for them, and give their estates quite contrary to their intent) answered, that this court holds plea of legacies, and judges of them by the rules of the civil law, and by that law any condition added to restrain marriage is void; so that where an interest doth not accrue to a third person by the breach of the condition, such a condition is void, and only *in terrorem*; and therefore decreed the 500*l.* to the plaintiff.

A testator, having two daughters, bequeathed to each of them 20,000*l.* to be paid them at their ages of 25 years, or marriage, which should first happen, so as such marriage was had with the consent of the mother and other trustees, and after such time as they respectively had attained the age of sixteen years: if either of them married before sixteen, or without consent, then such daughter to have only 10,000*l.* And he directed, that the surplus of his personal estate should be invested in lands, and settled on his daughters and their issue with cross remainders. In the testator's lifetime a treaty of marriage was set on foot between the plaintiff and one of the daughters; but before any agreement could be made, the testator died. After his death, however, the treaty was renewed, and the marriage was had with the consent of all the trustees, but before the lady was sixteen. The court decreed the 20,000*l.* to the plaintiff.

Hicks v.
Pendarvis,
2 Freem.
41.

Lord Salis-
bury v.
Bennet,
2 Vern. 223.
Skin. 285.
S. C.
2 Ventr.
365. S. C.
but differ-
ently report-
ed, for it is
said there,
that the
court de-
creed the
Lord only
10,000*l.*,
for that both
parts of the
condition
must be ob-

served. But these histories of the case seem to refer to different periods of time; the last to the original hearing before the Lord Keeper; the two former to a re-hearing before the Lords Commissioners.

Garret v.
Pritty,
2 Vern. 293.

A. bequeathed 3000*l.* to his daughter, the plaintiff *Garret's* wife, at 21, or marriage, and recommended her to the care of *S.*, provided that if she married without the consent of *S.*, her legacy of 3000*l.* was to cease, and she was to have but 500*l.*, and made the defendant, his son, executor and residuary legatee. The plaintiff married the daughter without the consent of *S.*; yet the court decreed her the whole 3000*l.* with interest from the marriage; and principally, because it was not expressly devised over, but to fall into the surplus.]

Preced.
Chan. 562.
Semphil. v.
Bayley, de-
creed in the
duchy court
by Lech-
mere, Chan-
cellour, and
King, C. J.
against the
opinion of
Justice Dor-
mer.

A., having issue three daughters *B.*, *C.*, and *D.*, devised 1000*l.* to be paid to *B.*, at the age of 21, or marriage, upon condition that she married with the consent of his executors; and likewise devised to her several messuages, &c. upon the like condition; and, after several other legacies and bequests, he devised the residue of his estate to his executors, for the benefit of his children. *B.* married, against the consent of the executors, a person who made his addresses to her in her father's lifetime, which the father knew, and was dissatisfied at; she had likewise notice given her by the executors of her father's will, and that by marrying without their consent she would be in danger of forfeiting her legacy; and that they could not approve of that match, because they knew that her father disliked it in his lifetime; yet it was held, that there being no express limitation over, the devise of the residue being after debts and legacies paid, that the condition was only *in terrorem*, and that the marriage, without consent, did not amount to a forfeiture of the legacy, &c.

Abr. Eq.
112. Amos
v. Horner.

A. devised to his daughter *M.* 100*l.*, to be paid by his executors upon her day of marriage, or age of twenty-five years, which should first happen, upon condition that she should marry with the consent of such and such persons; and if she married without their consent, then to have 50*l.* only, and no more, and gave the residue of his personal estate to the defendants; *M.* married the plaintiff, without such consent, before she was 20. And it was held by the Master of the Rolls, that this was more than a clause *in terrorem*, and that the devise of the surplus of the personal estate was a devise over of the 50*l.*, on *M.*'s disobedience.

Wheeler v.
Bingham,
3 Atk. 364.

[*P.* by his will (*inter al.*) gave to each of his grand-daughters that should be living and unmarried at the time of his decease, on their respective days of marriage, the sum of 1500*l.*, and desired, that none of his grand-daughters should marry without the consent of the father and mother, or the survivor of them; and therefore, if any or either of them should marry without such consent, then by his will he revoked what was thereby directed to be paid to such grand-daughter or grand-daughters, and such of them should not be entitled to any benefit by virtue of such his will, further than what the father and mother, or the survivor of them, should direct; and he afterwards directed, that after the several legacies and sums directed to be paid were satisfied, if any sum of money should remain in the hands of the trustees, the survivors or survivor of them, the same should be paid to his daughter *P.* for life,

life, and after her decease to the defendant and his heirs. The plaintiff, one of the daughters, married without the consent of the father and mother, and brought a bill for the legacy. Her mother appointed trustees of the legacy for the plaintiff for her separate use for life, and to her issue, but if she had no issue, then to the defendant. Lord *Hardwicke* held, that the plaintiff was entitled absolutely to this legacy; that it was merely personal; and though an express devise, that if the legatee should not perform the condition, the legacy should sink into the *residuum*, amounts to a devise over, yet that there was no such direction here; that if this had been a particular fund, which was given to the trustees, as certain stocks, or certain mortgages, and the will had said, the legatee shall have no more than the father and mother shall appoint, it would then have been a devise over of the remainder of that particular fund; but that this was only a description of the *residuum* of the personal estate in the hands of the trustees.

A testator bequeathed part of his personal estate to trustees, to pay one moiety thereof to *M. T.*, at her age of 21 years, if unmarried; and the other moiety to her at her age of 25 years, if unmarried; but if she should marry before she should be 21, with consent of her mother, then one moiety to be settled on her and her issue in such manner as her mother should think proper, and the other moiety to be disposed of as *M. T.* should think fit. But in case *M. T.* should die before 25 years unmarried, then, the whole of this legacy was bequeathed to her mother, to whom there was also a gift of the general residue of the real and personal estate. *M. T.* married before she was 21, against the consent of her mother. Lord *Thurlow* held, that the bequest to *M. T.* was hereby rendered void, and became the property of her mother, as part of the residue; for that a bequest of the residue is as effectual to defeat a personal legacy or a portion payable out of money, when the condition which is to vest the legacy has not been performed, as a specific devise over.

Scott v.
Tyler,
2 Br. Ch.
Rep. 431.

A testator devised 1000*l.* a-piece to daughters, if they married with the consent of *B.*, and if they married without such consent, then, they should have but 500*l.* a-piece, and the residue should go to the son. The daughters being 30 years of age sued for their legacies, and it was alleged in their behalf, that now being of that age, it was not material, whether they married with or without consent, being of understanding and discretion to dispose of themselves. But it was resolved, that the testator was chancellor of his own estate, and having added this restriction, and a limitation over, the court of Chancery could not alter it. Their full legacies were decreed to them; but they were to enter into recognizances for security of re-payment in case they married without such consent.

Lady Kil-
merly's
case, cited
in 2 Freem.
59.

A testator devised in the following words: "I give and bequeath
" to my kinswoman *Mary Barlow*, the sum of 1000*l.* to be paid
" her at her age of 21 years, or marriage, which shall first happen.
" Item, In case the said *Mary Barlow* shall marry with any one of

Barlow v.
Bateman,
3 P. Wms.
65. 4 Br.
P. C. 194.
S. C.

" the surname of *Barlow*, then I give her the further sum of 1000*l.*
 " to be paid her on the day of such her marriage with a *Barlow*
 " aforesaid. But if the said *Mary Barlow* shall die unmarried,
 " or shall marry a person not bearing the surname of *Barlow*,
 " then I give the last-mentioned sum of 1000*l.* unto *Charles*
 " *Barlow*." *Mary Barlow* married one *Robert Bateman*, and
 thereupon *Charles Barlow* preferred his bill for the last-mentioned
 1000*l.* as forfeited by this marriage. The defendant, *Robert Bate-*
man, by his answer admitted; that on the occasion of his marriage,
 and not before, he assumed and took upon him the name of *Barlow*,
 that his father's name was *Bateman*, and that he assumed and took
 upon him the name of *Barlow*, in order to entitle him to the said sum
 of 1000*l.* bequeathed to the said *Mary* on the condition aforesaid. The
 Master of the Rolls held, that the condition was complied with by
 the defendant's taking the name of *Barlow*, and dismissed the
 plaintiff's bill. But on appeal to the House of Lords, it was
 declared, that the appellant was entitled to the legacy of 1000*l.*
 conditionally bequeathed to him, and the decree of the Master of
 the Rolls was reversed.]

Mich. 1688.
 Pawlett and
 Dogget, in
 Can.

One by will devised 1300*l.* to his daughter *A.*, to be paid at her
 age of 21 years, and if she died without issue before 21, then to
 go over to *B.*, provided that if she married before 21, without con-
 sent of certain persons, then to go over to *C.* She did marry
 before 21, without such consent; and upon a bill brought by *B.*,
 it was decreed that *A.* should give security, &c. for the money,
 if she died before twenty-one without issue; and the Master of the
 Rolls, who heard the cause, said, the law was now settled accord-
 ingly; but the decree was so ordered as to serve both contingen-
 cies, viz., that upon her marriage before 21, without consent, the
 money should go to *C.*, yet so that if she died before 21 without
 issue, it should go to *B.* according to the devise.

2 Vern. 452.
 Aston and
 Aston.

A. by will gave portions to his daughters, without mentioning
 any time of payment, upon condition that they married with the
 consent of his wife; and if any married without such consent, her
 portion to go over. On a bill brought by the daughters for their
 portions, it was decreed accordingly, but on security to refund in
 case the condition should be broken; for it was held, that though the
 marriage without consent was but a condition subsequent, yet the
 court could not relieve against the forfeiture, by reason of the
 devise over, although it was admitted to be a hard condition, no
 time being limited, but going to a marriage at any time, even after
 the age of 21 years.

Abr. Eq.
 112, 113.
 King v.
 Withers.

The defendant's father devised to him, who was his heir at law,
 all his lands, &c., (except such and such parts) charged with the
 sum of 2500*l.* to his daughter (since married to the plaintiff) at
 her age of 21 years, or marriage, which should first happen; and
 devised the excepted lands, in trust, to be sold for the payment of
 his debts, provided that if his said daughter should marry in the
 lifetime of her mother, without her consent first had in writing,
 then 500*l.*, part of the said 2500*l.*, should cease, and should be
 applied towards payment of his debts charged on the said
 excepted

excepted lands, and appoints his wife to be guardian of his said daughter, and makes her executrix, and dies; the daughter attains her age of twenty-one years, and without the consent or privity of her mother, intermarries with the plaintiff, who was a gentleman of some estate, and called to the bar, but had made no settlement or provision for his wife; and therefore the defendant, the heir at law, refused to raise or pay any part of his sister's portion; and insisted likewise, that by her marriage without her mother's consent, 500*l.* part of her fortune, was become forfeited. Whereupon the plaintiffs brought their bill to have the whole portion raised by sale of the land charged therewith. *Per* Lord Keeper, this is a portion to be raised out of lands, and therefore to be considered as land: and though it be to go towards payment of debts on breach of the condition, and there appear one hundred and twenty creditors concerned, yet none that are in danger of losing their debts; and it is then to be considered as it stands upon the condition itself, and therefore the plaintiff must have her whole portion; for the testator has appointed two periods of time to entitle her to it, *viz.* marriage, or the age of 21; and as she has attained that age, it becomes a vested and settled interest in her, not to be divested by the marriage without the consent of the mother, for that consent cannot, in any reason, be carried farther than during her minority.

[A case arose upon the words of two wills, the one made by the father, and the other made by the mother of *Mary Graydon*, the plaintiff in the cross bill. The father's will was as follows: "I give the sum of 1000*l.* to my only daughter *Mary Graydon*, " to be paid her at her age of twenty-one years, or day of marriage, which shall first happen, provided she marry by and with " the consent of my executors: but, in case she dies before the " money becomes payable, on the condition aforesaid, then I give " the said 1000*l.* equally between my two youngest sons, *Benjamin* " and *Gregory Graydon*, Mrs. *Mary Graydon*, grandmother of *Mary Graydon*, *Mary Graydon* the mother, and Mr. *Jeremy Graydon* " the uncle, to be my joint and sole executors." The mother's will was in these words: "Item, I give to my daughter *Mary Graydon* all my wearing apparel of all sorts, with all my dressing " plate, jewels, watch-chain, &c. Then my will is, that in case " my daughter *Mary Graydon* shall marry before she comes to the " age of twenty-one years, without the consent and approbation " of my executor, under his hand first had and obtained, (if he be " living,) that then she shall not be entitled to any part of such " legacies as I have herein left her, but her whole share shall be " equally divided between my sons *Benjamin* and *Gregory Graydon*;" and the residue, after her debts and legacies paid, the testatrix gave to her three children, *Benjamin*, *Gregory*, and *Mary*, equally to be divided between them, or the survivors of them, share and share alike, and appointed her son *J. Graydon* to be her sole executor. The bill was brought by the plaintiff in the original cause against the defendant *Hicks*, as the husband of *Mary Graydon*,

Graydon v.
Hicks, and
Graydon v.
Graydon,
2 Atk. 16.

Graydon, to relinquish the 100*l.* which were left to the wife under the will of the father, she having married without the consent of the executors, and contrary to the direction of his will; and likewise to relinquish the legacies under the will of the mother. The executors under the will of the father were all dead before the marriage of *Mary Graydon*; and *J. Graydon*, appointed executor under the will of the mother, and who was to give his consent to *Mary Graydon's* marriage, renounced the executorship in the most formal manner in the ecclesiastical court. The cross bill was brought by *Mary Graydon*, as a feme sole, against the plaintiff in the original cause, as one of the devisees over under both wills, in case of *Mary Graydon's* marriage without consent; and likewise against Mr. *Timewell*, who took out administration to the mother, on the executor's renouncing; and also administration *de bonis non* to the father. Lord *Hardwicke* dismissed the cross bill, there being abundant evidence of *Mary Graydon* being married to *Hicks*. As to the original bill, his Lordship held *Mary Graydon* entitled to the 1000*l.* under her father's will, the condition upon which it was given being subsequent (a), and having become impossible to be performed by the death, before her marriage, of the persons whose consent was required; but he declared that the portion given under the mother's will was forfeited by the marriage without consent.

(a) *So, Peyton v. Bury*,
2 P. Wms.
626.

Holmes v. Lyfaght,
4 Br. P. C.
103.

J. S. bequeathed to his daughter in these words: "*Item*, I leave " and bequeath to my said daughter *Anne* 2000*l.*, to be paid her " on the day of her marriage, or at the age of twenty-one years, " which shall first happen; and in case my said daughter *Anne* " shall marry with the consent of *R. S.*, &c. or any two of them, " I leave her the additional sum of 2000*l.* more, otherwise not."

Anne married without the consent required in the will, and to a person to whom her father had expressed strong objections in his lifetime. On a bill brought by her and husband for both these legacies, it was decreed, that she was entitled to the first, but had forfeited the second. This decree was affirmed in the House of Lords by consent of parties.

Underwood v. Morris,
2 Atk. 184.

A father by his will gave the plaintiff *Agnes* his daughter 3000*l.*, payable at her age of twenty-one, or day of marriage, if she married with the consent of his executors; provided, if either of the legatees died before their legacies became payable as aforesaid, then such legacy was to be divided between the survivor of her brother and sisters. *Agnes* married the plaintiff *Underwood* at her age of fifteen, without the consent of the executors. The question was, Whether as *Agnes* was married without the consent of the executors, this devise was not to be considered as a devise over; and that, consequently, the legacy will not vest unless she arrive at her age of twenty-one? But Mr. Justice *Parker* said, as this is a mere personal legacy, he was of opinion, it was a devise *in terrorem* only, and that it vested absolutely in the daughter; and that marriage, one of the contingencies upon which it became payable, having happened, the executors must be decreed to pay it to the plaintiffs.

W. C.

W. C. by his will gave five-sixteenth parts of the residue of his personal estate to trustees, to lay out the same, and to pay the dividends, &c. to his daughter *Rachael*, on her attaining her age of twenty-eight years, or day of marriage, which should first happen, provided his daughter should marry with the approbation of his said executors, or such of them as should be then living. He gave the remaining eleven sixteenth parts among his other four children; and in case either of his sons or daughters should die before his, her, or their share or shares should become payable, then, the part or share, parts or shares, of him, her, or them so dying, should go and be paid among all the rest of his children who should then be living, and the issue of a deceased child or children (if any) *per stirpes*, and not *per capita*, at the same time as their original shares would become due. *Rachael* married *J. C.*, one of the defendants, without the consent of the executors, and had a child, (to whom *J. C.* administered,) and died under twenty-eight. It was insisted for the plaintiffs, that the portion never vested in *Rachael*, she marrying without consent, and not attaining twenty-eight years of age. On the other side it was argued, that the portion vested on the marriage, notwithstanding the proviso, which was only *in terrorem*, for which was cited the above case of *Underwood v. Morris*: and that, whether the condition be precedent or subsequent, it will not prevent the legacy from vesting, unless it be given over. But Lord *Loughborough* doubted the authority (a) of *Underwood v. Morris*, and decreed, that it did not vest: but there being five children of the testator, he held the infant child of *Rachael* to be entitled to one-fifth of the legacy, under the devise over, (as being "the issue of a deceased child,") and decreed the same to her father in her right.

A testator gave to *M.* 8000*l.*, and to her sister *S.* 5000*l.*, which several sums were to be paid to them at their ages of twenty-one, or day of marriage, which should first happen, provided they married with the consent of their father and mother, or the survivor of them; otherwise their legacies should sink into his personal estate. And it was the testator's will, that if the said *S.* and *M.*, or either of them, should thereafter marry with any person or persons whomsoever, without the consent of their father and mother, and the trustees named in the said will, or the greater number of them living, signified under their hand; that such of them so marrying should have or receive no more benefit or advantage by his will, or any thing therein contained, than if they were actually dead, or not named in his said will. Lord *Hardwicke* held, that the legacies vested in *M.* and *S.* on their attaining their age of twenty-one, and though either of them afterwards married without consent, yet it would be of no effect; for the marriage with consent must be construed to relate to the time of the legacies vesting.

The testator having only one child, a daughter, devised all his real and personal estate to *J. S.* in trust, after paying an annuity to his widow, for his daughter, if she married with the consent and approbation of *J. S.*; but if she should marry without such

Hemmings
v. Munkley,
1 Br. Ch.
Rep. 303.

(a) So, by
Lord Thurlow—
"The case
"of Under-
"wood v.
"Morris,
"by Baron
"Parker,
"does not
"seem to
"have been
"closely
"consider-
"ed. I agree
"with the
"late Lords
"Commissioners in
"denying
"the au-
"thority."
2 Br. Ch.
Rep. 428.

Pullen v.
Ready,
2 Atk. 587.

Burleton v.
Humphrey,
Amb. 256.

consent and approbation, then the premises to go to, &c. The daughter married within a month after the testator's death without even asking the consent of J. S., but about eleven months after her marriage, she obtained his approbation in writing. The question being, whether she had forfeited her estate or not; Lord *Hardwicke* held, that he was at liberty to construe the word *and* to mean *or*, which he accordingly did, and then the subsequent approbation was sufficient, and the previous consent was not necessary. He also held, that supposing the condition had made consent necessary, yet, that notice to the daughter, being heir at law, was necessary to work a forfeiture.

Long v.
Dennis,
4 Burr.
2052.
1 Bl. Rep.
630. S. C.

A testator devised to trustees, upon trust for his only son for life, then to the use of such woman as should be his son's wife at his son's death for her life; remainder to the issue of his son's body in tail; remainder to the testator's two daughters in fee: "Provided always, and it was his very will, true intent, and express meaning, that in case his said son should marry with any woman not having a competent marriage portion, or without the consent and approbation of the said trustees, their heirs and assigns, in writing under their hands and seals, to be executed in the presence of two or more credible witnesses first had and obtained; then his said trustees, and their heirs and assigns, should stand and be seised to and for the use of his (the testator's) said two daughters and their heirs for ever; any trust, use, &c. notwithstanding. And his will, true intent, and meaning was, and he did declare, that the said proviso and condition therein before expressly mentioned, was not intended by him, nor to be construed or taken *in terrorem*; but a condition, for want of performance whereof in every respect, the said lands, &c. should in no case be vested in such wife of his said son, nor the heirs of that marriage; but, on the contrary, that his said trustees and their heirs should stand seised of the premises, to the only use and behoof of his said two daughters and their heirs in manner aforesaid." The court of *K. B.* held, that all clauses and conditions in restraint of marriage, ought to be construed with the utmost rigour and strictness, against such restraint, and in favour of the person attempted to be restrained: that the testator meant, that the son's complying with either part of the alternative should be a performance of the condition; and that therefore he had not incurred a forfeiture by marrying (as the special verdict found he had done) a woman, who, at the time of her marriage with him, had a competent marriage portion, though he married her without any consent or approbation of the trustees.

Knapp v.
Noyes,
Ambl. 662.

The testator bequeathed to each of his daughters 1500*l.*, to be paid to them respectively at the time of marriage with the consent of his executors, whom he also made guardians of his daughters during their minority. There was likewise a clause in the will for their maintenance and education till their portions became payable. One of the daughters, after having attained twenty-one, died unmarried; and the question was, Whether the portion survived, that is, whether the time of payment was confined to the marriage?

marriage? Lord *Camden*, after observing, that it was very unnatural for a parent to impose a consent to a marriage during his daughter's whole life, said, that, considering all the clauses of this will, the portions must be understood to be payable at twenty-one, or marriage with consent.

A. E. bequeathed the sum of 1500 *l.* to his grand-daughter, to be at her own disposal, pursuant to the request of his deceased daughter *E. D.*, in case she married with the consent and approbation of his son *J. E.* and his wife; and in case of their deaths before that time, then with the consent and approbation of their trustees, and not otherwise. The grand-daughter survived the testator, but died at fourteen years of age, and unmarried. The legacy never vested.

Elton v. Elton, 1 Wils. 159.

A testator bequeathed the plaintiff 200 *l.*, provided she married with the consent of her father and mother, or the survivor of them. The plaintiff brought her bill to have the legacy raised and paid to her; and the question was, Whether she must not be married before she was entitled to have the 200 *l.*? The Master of the Rolls was clearly of opinion, that there must be a marriage first.]

Garbut v. Hilton, cited *ibid.*

(G) Of Specifick and Pecuniary Legacies, and the Difference between them.

[T]here are two kinds of gifts included under the description of specifick legacies. First, when a particular chattel is specifically described, and distinguished from all others of the same kind. Secondly, something of a particular species, which the executor may satisfy by delivering something of the same kind, as an horse, &c. The first kind may be more properly called an individual legacy, and if such, so bequeathed, is not found among the testator's effects, it fails; or, if given first to *A.* and then to *B.*, they must divide it; or, if it is disposed of in the life of the testator, it is an ademption of such legacy.

Per Lord Hardwicke in Pearce v. Snaplin, 1 Atk. 417.

Although it may be difficult to make pecuniary legacies specifick, yet money may be so distinguished as to be the subject of a specifick bequest, as money in a certain chest (*a*), &c.; or a particular sum of money in the hands of *B.* (*b*); or a particular debt (*c*). So, a bequest of stock in a particular fund is specifick (*d*); or a legacy to be paid out of the profits of a farm which the testator directs to be carried on (*e*). So, a bequest of part of a specifick chattel may be equally a specifick legacy, as, where the testator gives part of the debt due to him from *A.* (*f*); or part of his stock in a particular fund (*g*).

(*a*) *Lawson v. Stutch*, 1 Atk. 503.
(*b*) *Hinton v. Pinke*, 1 P. Wms. 540.
(*c*) *Ellis v. Walker*, Amb. 310.
Ashburner v. Macguire, 2 Br. Ch. Rep. 108.

(*d*) *Ashton v. Ashton*, Ca. temp. Talb. 152. *Avelyn v. Ward*, 1 Vez. 424. *Drinkwater v. Falconer*, 2 Vez. 623. (*e*) *Mayer v. Mayer*, 2 Br. Ch. Rep. 125. (*f*) *Heath v. Parry*, 3 Atk. 103. (*g*) *Sleech v. Thoringdon*, 2 Vez. 563.

But a mere bequest of quantity, whether of money, or of any other chattel, is a general legacy, as of a quantity of stock (*h*); and where the testator has not such stock at his death, it is a direction

(*h*) *Furse v. Snaplin*, 1 Atk. 414.
Sleech v.

Thorington, 2 Vez. 562. Bronf-
don v. Win-
ter, Ambl. 57. Bishop of Peterborough v. Mortlock, 1 Br. Ch. Rep. 565. (a) Partridge v. Partridge, Ca. temp. Talb. 227. Bronfson v. Winter, *ubi supra*. (b) Hume v. Edwards, 3 Atk. 693. Lewin v. Lewin, 2 Vez. 417. (c) Peacock v. Monk, 1 Vez. 133.

2 Chan. Ca. A specifick legacy differs from a pecuniary legacy, or a sum of
25. 171. money, in that the legatee is not, in case of deficiency of assets,
Vern. 31. to (d) abate in proportion, as pecuniary legatees must do.

2 Salk. 416. pl. 3. (d) But though a specifick legatee has a preference, and is not to abate in proportion with other
legatees, where the estate falls short, as to the payment of debts, yet he cannot in any case have more
than the testator could or did devise to him; and therefore where a freeman of London devised a lease
for years to J. S. who was evicted of a moiety thereof by the widow claiming it by the custom; it was
held, that the specifick legatee should have no satisfaction for this eviction out of the surplus, the
testator having power to dispose only of a moiety. 2 Vern. 111. [But where the reversion of a lease-
hold estate for three lives was devised to A. for life, afterwards to B., and then to B.'s son, and a
creditor of the testator filed a bill to charge the estate with his debts, Lord King said, that as this was
a specifick devise, all the rest of the testator's personal estate not specifically devised, must be first applied
to pay the debts; and if there were any other specifick devise, the same ought to come in average with
this, and pay its proportion; but if that would not serve, all must be sold to pay the testator's debts.
Duke of Devon v. Atkins, 2 P. Wms. 381.]

2 Vern. 683. So, if a man devise his personal estate at W., this is as much a
Sayer and Sayer. Pre- specifick legacy, as if he had enumerated the several particulars of
ced. Chan. it; and though the other legacies fall short, yet the legatee must
392. S. C. have this specifick legacy entire.

Preced. But if the testator devise his personal estate at A., and his per-
Chan. 393. sonal estate at B., and then devise a legacy out of his personal
estate, and have no personal estate but what lies in those two places,
the pecuniary legacy must be paid out of these specifick legacies
thus particularly devised.

Preced. So, if after several specifick legacies the testator devise a pecu-
Chan. nary legacy, or sum of money, out of all his personal estate what-
393-4. soever; in this case the pecuniary legacy shall come out of the
estate at large.

If a horse, or term for years, which is specifically devised to
another, be taken in execution by creditors on a judgment obtained,
(as they may be,) the specifick legatee shall have recompence in
equity against the executors, or residuary legatees, for the value,
who are to have nothing till after the debts and legacies are
paid.

Abr. Eq. J. S. having 4000*l.* secured to him by bond in the names of
298. Lord A. and B., in trust for himself, devised it to his daughter, (now
Castleton married to the plaintiff,) and made her residuary legatee, and by
v. Lord the same will devised a lease he had in farm to R. D., and there
Fanthaw. not appearing assets at his death to pay his debts, this farm devised
to R. D., was sold for payment of debts; afterwards, by decree of
this court, the 4000*l.* was adjudged to be assets to pay debts, and
was brought into court, there to remain for that purpose. The
plaintiff proposed to have what remained of the 4000*l.* paid out
of court to him, all debts being (as it was said) paid, and the de-
fendant R. D. opposed it till he had first had a satisfaction out of
it for the value of the farm devised to him, and sold for the pay-
ment of debts. The court held, that the devise of this sum of
money

money was a specifick legacy, and therefore *R. D.* can have but a proportionable part of the value of his specifick legacy out of it.

(H) Of abating, refunding, and giving Security for that Purpose.

PECUNIARY legatees shall abate in proportion to the deficiency of assets; and therefore if the ecclesiastical court go about to compel an executor to pay a legacy without security to refund, a prohibition will be granted; for though an executor may pay a legacy without such caution or security, yet he is not obliged to do it.

So, if a man devise several legacies, as 100 *l.* to one, and 50 *l.* to another, &c. there, although he directs the legacy of 100 *l.* to be paid in the first place, yet, if the other legacies fall short, then the legatee of the 100 *l.* must make a proportionable abatement of his legacy.

So, if a legacy be given to executors for care and pains, yet this shall give such legacy no preference, but the executors must abate in proportion.

As to refunding and abating, it seems clear, that creditors may compel legatees in equity to refund when assets become deficient, although there was no provision made for refunding at the time the legacies were paid.

So, where *A.* being indebted to *B.* made *C.* his executor, and *C.* wasted the estate, and died, having devised several legacies, and made *D.* executor, which legacies *D.* paid, and *B.* having exhibited a bill against *D.*, the executor of *C.*, for his debt due from the first testator, and against the legatees in the will of *C.*, to compel them to refund their legacies, there not being sufficient assets of the first testator, it was decreed accordingly (*a*); for a creditor may follow the assets in equity, into whose hands soever they come.

Also, one legatee may compel a pecuniary legatee to refund where the assets become deficient, though there was no provision made for refunding, and although he hath still remedy against the executor, and may compel him to pay it out of his own purse, if he voluntarily paid away the assets to the other legatees.

But it seems to be agreed, that an executor who voluntarily pays a legacy, or assents to the devise thereof, cannot, either in favour of other legatees or creditors, compel the legatee to refund, but that in such case he must bear the loss himself.

But it is said, that if an executor pays out the assets in legacies, and afterwards debts appear, of which he had no notice at the time of payment of the legacies; or if he had been compelled by a decree in equity to pay legacies; that in these cases he may by bill in equity, compel the legatees to refund, although he took no caution or security for that purpose.

Cro. Eliz.
467.
Moor, 413.
Owen, 72.
Allen, 40.

Vern. 31.
Brown and
Allen.

2 Vern. 434.
Fretwel and
Stacey.

Vern. 94.
2 Vent. 358.
360.
2 Vern. 205.

Vern. 162.
1 P. Wms.
495.

(a) 2 Vern.
205. laid
down as a
rule.

Chan. Ca.
136. 248.
2 Chan. Ca.
132.
Vent. 360.

2 Chan. Ca.
9. 145.
Vern. 90.
453. 460.
2 Vern. 205.

Chan. Ca.
136.
2 Vern. 205.
1 P. Wms.
495.

Davis v.
Davis,
Vin. Abr.
tit. Devise
(Q. d.), 35.

[On a bill by an executor against a legatee to refund a legacy voluntarily paid him by the executor, the assets falling short to satisfy the testator's debts; it was decreed by Sir J. Jekyll, Master of the Rolls, that the defendant should refund to the plaintiff; and that an executor may bring a bill against a legatee to refund a legacy voluntarily paid him, as well as a creditor; for the executor, paying a debt of the testator out of his own pocket, stands in the place of the creditor, and has the same equity against a legatee to compel him to refund.]

Anon. 2 P.
Wms. 495.

But if an executor had at first enough to pay all the legacies, and afterwards by his wasting the assets, occasions a deficiency, in such case a legatee who has recovered his legacy, shall not be compelled to refund, but shall retain the advantage of his legal diligence, which the other legatees neglected by not bringing their suit in time, before the wasting by the executor; whereas if the other legatees had commenced their suit before such waste committed, they might have met with the like success, *et vigilantibus, non dormientibus jura subveniunt.*

Walcot
v. Hall,
1 Cox's P.
Wms. 495.
note.

In Orr v.
Kaines,
2 Vez. 194.

Sir J. Strange
is reported to
use these
words:

"The rule,
of which
there are se-
veral cases in
Eq. Ca.
Abr. is,
that when-
ever an ex-
ecutor pays
a legacy, the
presumption
is, he has
sufficient to

J. P. by will gave to the plaintiff 50 *l.*, to be paid to him at his age of twenty-one years, or day of marriage, the same to be put out at interest in the name of his executor, C. P. H., &c. He then disposed of the residue, and appointed C. P. H. executor, who proved the will, retained the 50 *l.* for the plaintiff's legacy, and afterwards became bankrupt, and obtained his certificate. The plaintiff having attained his age of twenty-one, filed his bill against the executor and the residuary legatees for payment of the legacy. The Master of the Rolls, Sir L. Kenyon, said, the residuary legatees could not be liable; that the distinction was between the cases where there was originally a deficiency of assets, and where the executor had wasted them; in the former case, a legatee who had been paid more than his proportion, must refund to the others; but here, the residuary legatees had received no more than they were entitled to, and the executor was therefore the only person to be resorted to. And his Honour, being of opinion, that this demand, as against the executor, was barred by his certificate, dismissed the bill.]

pay all legacies, and the court will oblige him, if solvent, to pay the rest, and not permit him to bring a bill to compel the legatee, whom he voluntarily paid, to refund; *although, if the executor proves insolvent, so that there is no other way, the court will admit a bill by the other legatees to compel that legatee to refund.*"

(I) Of Residuary Legacies and Legatees.

Vide tit.
Executors
and Admi-
nistrators.

THE testator's making his will, and appointing an executor, is a disposition of all his personal estate, after debts and legacies paid, to such executor, without more words; but if the testator appoints, that after his debts and legacies paid J. S. shall have the surplus, or what remains; then is J. S. residuary legatee, and may sue for and recover such surplus or residue, and is also, upon the executor's refusal to prove the will, entitled, from his interest therein, to administration, with the will annexed.

If a residuary legatee die before the debts are satisfied, so that it doth not appear to how much the surplus will amount, yet the executor or administrator of such legatee shall have the whole residue of the personal estate which remains over, &c. and not the executor of the first testator. Carth. 52.
per Curiam.

Also, if there be a residuary legatee, and the executor omit part of the testator's effects out of the inventory, or undervalue those which he puts in, the residuary legatee may file a bill of discovery against him before he has paid the testator's debts. Palm. 407.

If a man devise all the rest and residue of his personal estate, after debts and legacies paid, to *J. S.*, and several of the creditors are barred by the statute of limitations, who notwithstanding bring actions against the executor, and he refuses to plead the statute of limitations, yet equity will not, in favour of *J. S.* to whom the surplus is devised, compel the executor to plead the statute. Abr. Eq.
305. Lord
Castleton v.
Lord Fanshaw.

(K) Of the Payment of Legacies : And herein,

1. What shall be a good Payment, and to whom to be made.

AN executor, in the payment of a legacy, ought to be careful that he takes a proper receipt (*a*), or has sufficient vouchers of the payment; and the rather, because it is held to be such an equitable demand as is not (*b*) barred by the statute of limitations. Preced.
Chan. 228.
[(a) The
receipt by
36 Geo. 3.
c. 52. must
be on a

Stamp for every species of legacy. See tit. Stamps.] (*b*) Vern. 256.—But where after length of time a legacy was presumed to have been paid, *vide* 2 Vern. 21. 484. [Jones v. Turberville, 2 Vez. jun. 11. But if the legatee allege that he knew not of his right, it seems, the presumption cannot be raised. Ord. v. Smith, Sel. Ca. Ch. 11.]

Also, an executor ought to be careful that he pay it to the proper hand that has authority to receive it, and that without a decree or order of a court of equity he cannot pay it to the (*c*) father, or any other relation of an infant. Chan. Ca.
245.
(b) Where
a father li-
belled in the
spiritual

court that his children's legacies, being infants, might be paid to him, and a prohibition granted. Godb. 243.

As, where a legacy of 100*l.* was devised to an infant of about ten years of age, the executor paid this legacy to the father, and took his receipt for it; when the infant came of age, the father told him he had such a legacy of his in his hands, but could not pay it immediately, but however would not have him trouble the executor about it, for that he would give it him; upon this the son rested satisfied for about fourteen or fifteen years, and he and his father carried on a joint trade together, and then became bankrupts; and upon a commission taken out against the son, this legacy, among other things, was assigned for the benefit of his creditors; and the plaintiff, the assignee of the commission, brought his bill against the executor, to have an account and payment of the legacy; and for the defendant it was insisted, that this would be an extreme hardship on him, if he should be obliged to pay it over again; that he had already fairly and honestly paid it to the father Abr. Eq.
300. Doyly
v. Tollferry,
1 P. Wms.
285. S. C.
Gibb. Rep.
103. S. C.
4 Burn's
E. L. 321.
S. C.

whilst

whilst he was in good circumstances, and if application had been made sooner, he might have had his recompence over against the father; that the father was by nature guardian to his children, and such payments to him have formerly been allowed good, though now indeed this court has thought fit to extend its care farther for such children, and disallowed such payments; but the circumstances of this case were such, that the defendant. it was hoped, would not be answerable again for it. My Lord Chancellour said, that if the father had not made his son such promise of recompence, and the son had acquiesced all that time, the case might have been more doubtful; but this promise of his father drew him to forbear applying to the executor sooner, and since his father had not, nor could now make good his promise, being a bankrupt likewise, the reason of the son's forbearance was at an end; and he thought the rule of this court, in not suffering parents to receive their children's legacies, was founded on very good reason; and therefore lest this case might hereafter be cited as a precedent, when the circumstances attending it were forgotten, and to discountenance and deter others from paying such legacies to the parents, (though he did not deny the hardships of this particular case,) he decreed against the executor, which was affirmed on a rehearing.

Philips v.
Paget,
2 Atk. 80.

[Mrs. *Paget* gives a legacy of 100*l.* to each of the three children of Mr. *Philips*, and makes the defendant her executor, leaving him the bulk of her estate, provided he pays the three legacies of 100*l.* within a year after her death, pursuant to her will. The defendant, within the time, pays into the children's own hands their legacies: the eldest of them was sixteen years old at the time, the next fourteen, and the youngest nine only. The children now brought their bill against the defendant, to be paid their several legacies, suggesting that their father had embezzled the money paid by the defendant during their infancy, and was insolvent, and that this was a fraudulent payment to the father, and therefore it must be paid over again. The defendant in his answer denied he knew this money ever came to the father's hands. Lord Chancellour asked the counsel for the defendant, if they knew any instance where an executor paying so large a sum as 100*l.* into the hands of minors, has been allowed such payments? Indeed, in cases where legacies have been very small, the payment has been allowed by the court. But in this case, notwithstanding the sum is above 100*l.*, yet, as the payment by the executor to the children themselves is so fully proved, and not at all controverted by the plaintiffs, and their losing the benefit of it is owing to the negligence and insolvency of the father, his Lordship said, he would not strain the rules of the court to make the executor pay it over again; especially, as he made this payment to save a forfeiture, it being an express condition of his own taking under the will, that he should discharge these legacies within a year after Mrs. *Paget*'s death. But the next day, the Lord Chancellour said, that, upon looking into the cases, he found this a very doubtful point; and unless the defendant would agree

to give the plaintiffs something, he would not determine it, without taking time to consider of it. The defendant, upon this recommendation of the court, agreed to pay in 50*l.* to be divided between the three plaintiffs; and each side were to abide by their costs; and it was made part of the decree, that the 50*l.* were paid by consent of all parties; and his Lordship directed each of the plaintiffs, upon receiving their respective shares, to release their legacies under the will. The case of *Dagley v. Tolfery*, he said, must have some other circumstances; for the rule is laid down too strictly, that in all cases where executors pay infants' legacies to fathers, in order to deter executors from such payments, they shall be paid over again. Lord Cowper confirmed the decree of the Master of the Rolls in that case; but he seems, even by this report of the case, to have had a remorse of judgment at the time; for on looking into the registrar's office, it appears, his Lordship ordered the deposit to be divided between the parties. Supr. 429.

In *Rotheram v. Fanshawe*, Lord Hardwicke said, *arguendo*, that where a suit is instituted in the spiritual court for an infant's legacy, by a father, to have it paid into his hands, the court will grant an injunction; because it will not allow the money of an infant to come into the father's hands. 3 Atk. 629.

B. T. by will gave several pecuniary legacies, and among the rest, "to *Thomas Cooper* of ——— *Street, Westminster*, one hundred pounds, to be equally divided between himself and his family," and made ——— *Winstanley* and the defendant (his wife) executors, and the defendant residuary legatee, and died in 1768. In November 1769 *Winstanley* paid the legacy to *Thomas Cooper*, who, at that time, had a wife and seven children, six of whom were adults, and the seventh an infant. The father lived till 1775, when he died, no demand having been made by any of his children of this legacy. *Henrietta*, the youngest child, came of age in 1777. In 1784 she and the other children made a demand of this legacy; and in 1779 they filed their bill (after the death of *Winstanley*) against the defendant as executrix and residuary legatee of the testator, for the legacy, insisting, that the payment to *Thomas Cooper* was not a good payment, and that, therefore, the defendant was liable to pay it over again. The Master of the Rolls said, it is argued on the part of the plaintiffs, that the payment to the father of legacies given to his children, who are not of age, is a bad payment. In early times, it appears from the case of *Holloway v. Collins*, in the 26th and 27th Car. 2. 1 Eq. Abr. 300. that the payment to the father of a legacy to the child, was held good: but, since the case of *Dagley v. Tolfery*, the idea of the court has been, that it is not a good payment: and that even in the case of an adult child, it is not good, unless done by the consent of the child, or made so by a subsequent ratification. In that case the rule was laid down, and was laid down very harshly, as the testator, on his death-bed had given directions that the legacy should be paid to the father, and there had been mutual accounts between the father and the child, and an acquiescence for Cooper v. Thornton, 3 Br. Ch. Rep. 96.
Supr. 429.

for near fifteen years. It appears, from the registrar's book, that evidence was read, that the legacy was ordered by the testator to be paid to the father: but that circumstance can make no difference, as I doubt much whether such evidence ought to be read. It would be a dangerous thing to admit evidence that a legacy given to one person was ordered to be paid to another. From the registrar's book of the year 1714, fol. 414, it appears, that the defendant was decreed to pay the plaintiff his legacy with costs, but no interest; and from the book *A.* of the year 1715, fol. 40, that an appeal being brought before Lord Cowper, the decree was affirmed; but as it was thought a hard case, the deposit was divided. I lay the matter out of the case, that it was directed to be paid to the father; and although it was so directed, and the money paid, and although the son acquiesced a great length of time, it should be still competent to him or his representatives to demand it; because a contrary determination would encourage such payments, and because the son must acquiesce, or pursue his father; or, which is the same thing, by bringing his suit against the executor, occasion his pursuing the father; and that I take to be the ground on which Sir J. Trevor and Lord Cowper went; and if the legatee did not stand in that relation to the person to whom the legacy was paid, the bill would be dismissed. The only other case is *Philips v. Paget* (*supra*). It went off upon a compromise, so that we have no account of it but from Mr. Atkin's book. There, the executor was misled by the testator's directions to pay the legacies within a given time. Then let us consider the circumstances of the present case, for I do not mean to interfere with the doctrine of *Dagley v. Tolfery*, that a payment to the father is bad. The present case is a stronger case for the executors than that of *Philips v. Paget*. Here, after several other legacies, all with the words "I give to," &c., is the following, "To Thomas Cowper, to be divided between himself and his family." I should do the hardest thing in the world to make the executor pay it over again. It is true, the testator has not inserted the words *by him to be divided*. If he had, there could not have been a doubt: but if he meant the executors to divide, why did he mention *Thomas Cowper*? What did he mean by the word *himself*? That can only be applicable, if *Thomas Cowper* is to divide. Then it is not only to him and his children, but to his *family*, which is much more extensive. It is to be paid to him, and he, as a trustee, is to divide it. If any of the children had called upon him to have it secured, it must have been so. Therefore, if in *Philips v. Paget*, the executor was discharged, *a multo magis* he must be so here. Supposing it to be paid by *Winstanley* in a manner that was wrong; for I must allow it to be wrong, if it was not meant to be paid to *Thomas Cowper*; *Cowper* died in 1775; from that time the plaintiffs might have called upon the executor without his being able to pursue the father. In 1777, the youngest came of age: why did they not then file their bill against *Winstanley*, who did not die till after this bill was filed? For six years they took no step. If they had brought their bill, they might have recovered against *Winstanley*.

But

But, under the circumstances of the case, I believe it was well paid, and that it was intended, that he should receive it. If one was to give a legacy to the senior six clerk, to be divided between himself and the other six clerks, I think it should be paid to the senior, and the executor not be put to inquire, who the other six clerks were. And that if it had been the case of a bequest of goods to *A.* to be divided between himself and family, *A.*, with the assent of the executor, might bring trover for the goods. His Honour therefore dismissed the bill.

Where a testator bequeathed his personal estate to trustees, in trust to pay (*inter al.*) 500 *l.* to an infant, and directed, that such of his legatees as might be infants at the time of his decease, should receive interest at the rate of 5 *l. per cent.* till their respective legacies should be paid, which he desired might be to the boys at the age of 21 years, &c.; it was holden, that the executors could not justify paying any part of the principal before that time to the infant, or to his use, except for express necessities.]

If a legacy be given to a feme covert, it must be paid to the husband; also, where a legacy was given to a feme covert who lived separate from her husband, and the executor paid it to the wife, and took her receipt for it, yet on a bill brought by the husband, he was decreed to pay it over with interest. 2 Vern. 261.

Also it hath been adjudged, that if husband and wife are divorced *a mensâ & thoro*, and a legacy is left to her, the husband alone may release it. Roll. Abr. 343. 2 Roll. Abr. 301. Moor, 665.

Cro. Eliz. 908. Noy, 45. Roll. Rep. 426. 3 Bull. 264. Moor, 683. Salk. 115. pl. 4. Ld. Raym. 73. 12 Mod. 891. 5 Mod. 69. But a person may by deed or will give any thing in trust for the separate use of a feme covert, and this shall be out of the power of her husband. 2 Vern. 659.

A legacy of 1000 *l.* was given to one, after the death of her mother, when she should attain the age of 21 years; and the defendant was appointed trustee for the raising and payment thereof out of certain lands; the legatee was drawn into an improvident match with one who soon after became a bankrupt, and the commissioners assigned all his effects, and gave him a certificate of his conformity; and the assignees brought a bill against the trustee for this 1000 *l.*, who insisted that the assignees could be in no better condition than the husband, and that if he were plaintiff he could not prevail without making a suitable provision on his wife; and that this legacy being liable to a double contingency, *viz.* the death of the mother, and the legatee's arriving at the age of 21 years, at the time of the bankruptcy, was not such an interest as could be assigned. The court held, that though both contingencies have since happened, yet those being since the assignment of the bankrupt's estate, and since a certificate of his having conformed himself in every thing to the acts, he was now discharged as a bankrupt; and this legacy could not pass without a new assignment, which the commissioners could not make, their commission being determined. Abr. Eq. 54. Jacobson v. Peter Williams.

2. At what Time a Legacy is to be paid.

Godolph. By the civil law, executors have a year's time, from the death
Orph. Leg. of the testator, to pay legacies: and in conformity to the civil
272. 2 Salk. law, the same rule hath been taken up, and is now followed, in
415. pl. 2. the court of Chancery.

2 Vern. 31. If a legacy is given to a child, payable at 21 years, and the child
199. 283. dies before, though his administrator shall have the legacy, yet he
must wait for it till such time as the child, if he had lived, would
have come to the age of 21.

Abr. Eq. But where *A.* by will gave a legacy to *B.* at 21, and if he died
299. 300. before 21, then to the plaintiff; *B.* died before 21; and the only
Laundy and question was, Whether the plaintiff was entitled to the legacy
Williams. presently, or must wait till *B.*, if he had lived, would have been
1 P. Wms. 21? And on time taken to consider of it, my Lord Chancellor
478. S. C. was of opinion, the plaintiff was entitled to the legacy presently (*a*);
So, 1 Atk. but that where a legacy is given to one to be paid at 21, so
556. as to be an interest vested in him presently, though not payable
(*a*) Forthius till 21, if the party dies before that age, his executors or admini-
vide Leon. strators shall not have it till the legatee, if he had lived, would be
277-8. 21 years of age.
And, 33.
2 Roll.
Rep. 134.
[The rule

seems to be this—If a legacy be payable at 21, and the child die, his representatives cannot claim till the time when the child would have arrived at 21, if the legacy does not bear interest, *Harrison v. Bickle*, 1 Str. 238. *Roden v. Smith*, Amb. 588., but, if it be with interest, they may claim immediately. *Green v. Pigot*, 1 Br. Ch. Rep. 105. *Fonnercau v. Fonnercau*, 1 Vez. 118.]

Chester v. [A testator gave to *J. S.* the sum of 1. payable at 21, and
Painter, in the mean time that he should have the yearly sum of 1.
2 P. Wms. which did not amount to the interest of the legacy given to him.
335. *J. S.* died under 21, and his executors demanded the legacy pre-
sently. But it was holden at the council, unanimously, that the
executors of the legatee should wait for their legacy until such time
as their testator should, in case he had lived, have attained 21, it
being unreasonable, that the executors of *J. S.* standing in his
place, should be in a better case than *J. S.* himself would have
been, had he been living; and it was to be presumed, that the first
testator had made a computation of his estate, and considered when
it would best bear and allow of the payment of this legacy; and
there could be no reason given, why an uncertain accident should
accelerate the payment of this legacy before the time which was
at first intended for that purpose.

Feltham v. One, having several daughters, charged his lands with 1000 l.
Feltham, to each of them, payable at their respective ages of 22, or marriage,
2 P. Wms. which should first happen; and if any of his said daughters should
271. die before her portion became payable, the share of her so dying
should go to the survivors. One of the daughters died before 22,
or marriage, and another of the daughters attains 22 years of age.
By the court—This portion arises out of lands, and it would be
an hardship on the heir (whom equity favours) to make it payable
before the time it was intended. Now there can be no reason to
make

make the additional portion payable before the original one; wherefore as the heir is to suffer by the raising of these portions, it may reasonably be presumed in favour of him, that the testator might compute within what time they might be paid, so that this additional portion shall not be paid before such time as the daughter to whom it was given should have come to the age of 22 years, if she had lived.]

A legacy of 500*l.* was given to the eldest son of *A.* to be begotten, to place him out apprentice; *A.* had a son born after the death of the testator, and on a bill brought by him for the legacy, it was decreed to be paid, though before such time as he was fit to be placed out apprentice.

2 Vern. 431;
Nevil and
Nevil.

If legacies are given to *A.*, *B.*, and *C.*, being the testator's three coheiresses, to be paid at their respective marriages, and if any of them die, her legacy to go to the survivors; and one of them dies unmarried, the survivors shall not receive her legacy before their respective marriages, for the condition, though not again repeated, shall go to the whole, as well to what accrued by survivorship as to the original devise.

2 Vern. 620;
Moor and
Gosfrey.

3. Where the Legatee shall have Interest, and Maintenance till the Legacy is paid.

If a legacy be devised generally, it is regularly to carry interest from the expiration of the first year after the death of the testator; but if the legatee, being of full age, neglects to (*a*) demand it at that time, he cannot have interest but from the time of the demand.

2 Salk. 415;
Pl. 2. &
vide Vern.
251. 262.
(a) That a
legacy dif-
fers from a

debt, and must be demanded, otherwise the legatee not entitled to interest. Poph. 104.—So, though a bond was given for performance of the will. 1 Leon. 17.

But it is said, that if a legacy be devised generally, and no time ascertained for the payment, and the legatee be an infant, he shall be paid interest from the expiration of the first year after the testator's death, though no demand be made, because no laches shall be imputed to him.

2 Salk. 415.
Pl. 2.

Also it is said in *Salk.* that a legacy left payable at a (*b*) certain day, must (as it seems without demand) be paid with interest from that day, and that the interest allowed is 5*l.* per cent.

Salk. 415.
Pl. 2. per
Ld. Cowper,
(b) But in

Preced. Chan. 161. it is held, that though a legacy be devised to be paid at a cert in time, yet it shall not carry interest but from a demand made; otherwise, of a debt.

The plaintiff had a legacy devised to him, payable within a year after the death of the testator, who was his half-brother; the plaintiff knew nothing of the legacy, nor of the testator's death, till the executor published it in the *Gazette*, and then he demanded his legacy of the defendant the executor; and the only contest was, whether the plaintiff should have interest from the time the legacy should have been paid. And the court would not give any interest, not so much as from the time of the bill exhibited, nor would they give costs even out of the assets, but the bare legacy.

Preced.
Chan. 11.
Knapp and
Powell.

Attorney
General v.
Thompson,
1 Eq. Ca.
Abr. 301.

[If a father devise legacies or portions to his daughters, or younger children, to be paid or payable at their respective ages of 21 years, or at any other time certain, without making any provision for their maintenance in the mean time, and die, in this case, they shall have interest for their portions from his death, till paid, because the father was obliged to have provided for them, if he had lived; but if such portions had been devised to them by a stranger, to be paid or payable at such age, their legacies should not carry interest in the mean time, because he being a stranger, was under no such obligation to provide for them.]

Conway v.
Longville,
1 Eq. Ca.
Abr. 301.

So, where a father, by his will, gave 2000 *l.* a-piece to his two daughters, payable at 21, and charged on land and personal estate; and the personal estate was exhausted in debts; Lord Chancellor held, they should have a reasonable maintenance out of the real estate until their legacies became payable, and allowed them 80 *l.* *per annum* each.

Ingleton v.
Northcote,
3 Atk. 433.

A testator devised his real estate, and a residue of his personal estate, in trust for payment of all his debts, and subject thereto, for raising 5000 *l.* for such child or children of his body issuing, as should attain 21, to be paid to such child or children, if but one, but if more than one, equally to be divided between them. Though the 5000 *l.* were given to such children of the testator's body as should attain the age of 21, and, consequently, the legacy was not vested, yet, Lord Hardwicke decreed interest. In the case of strangers, he said, whether the legacy be given absolutely, and payable at 21, or not given until 21, the legatees can have no interest in the mean time; but in either of these devises, where they are given to children, the court will direct interest for their portions immediately; and it has been so done frequently.

Hearle v.
Greenbank,
3 Atk. 716.

A testatrix bequeathed to her daughter 100 *l.* a-year, until the age of 10 years, and after, the further sum of 50 *l.* a-year till she attained the age of 21, *the said sums to be applied by her executors for the education and maintenance of her said daughter according to their discretion.* She also bequeathed to her said daughter 8000 *l.* to be paid her when she should attain the age of 21 years, but if her said daughter should die before the said age, without issue living at her death, then she bequeathed the said 8000 *l.* to, &c. Lord Hardwicke was of opinion, that the daughter was not entitled to the interest of the 8000 *l.* The general rule is, he said, where legacies are given, payable at a certain time, they carry no interest, for interest is for delay of payment, and, consequently, till the day of payment comes, no interest is demandable. But I admit, where the legacy is given by a father to a child, though the legacy is not payable but at a certain time, yet the court allows interest. But in all these cases, the ground the court goes upon, is giving interest by way of maintenance. Here, the testatrix has allotted maintenance for her daughter from the general fund of her personal estate. There is another thing observable, the contingency in the will of the daughter's dying before 21. I agree it is a condition subsequent, but still it shews the view of the testatrix, and that it might never be her daughter's, and therefore to give her

her interest would be contrary to the intention of the testatrix. There are several cases where the court has made a great stretch to give children interest on legacies, particularly *Acherley v. Vernon*, 1 P. Wms. 783. but that went upon particular circumstances. Therefore, I am of opinion she can have no more interest than the maintenance in the mean time.

A legacy was given to an infant, the testator having a great deal of money in bank stock. The executor was residuary legatee. A bill was brought in the Exchequer for the legacy. And the question was, Whether it should bear interest, and from what time? Chief Baron *Pengelly* and Baron *Hale*; it is a certain rule, that where a fund is certain, as where charged on land, it shall bear interest, because it plainly appears the rents are received: so, the fund on which it is charged produces a profit here, it is equally certain, and therefore should bear interest, and should be from the testator's death. But this was opposed by *Carter* and *Comyns*, Barons, that it should only bear interest from a year after the testator's death; for as legacies are to be paid after debts, the executor has that time to inquire, till which time they are not payable, so not to bear interest: which was agreed. A difference was offered to be made, that as there was a legacy to an infant, it could not be safely paid, and therefore could not bear interest. To which it was answered by the Chief Baron, that it might be safely paid into the hands of an infant, having proper evidence of the payment, as in *Wentworth's Executor*, 313. And by *Carter*; it may be paid into the hands of the guardian, having evidence; but if he takes security from the guardian which should prove defective, there, as he doth not rely on the security the law gives, he must depend on that taken at his peril.

Bilson v. Sanders,
Bunb. 240.
Sel. Ca. in
Chan. 72.

The grandfather of the plaintiff, by will, after directing his debts and legacies to be paid, gives all the rest and residue of his personal estate to his grandson the plaintiff at his age of 21, and if he die before that age, then to the defendant *Freeman*, whom he makes his executor. The plaintiff brought his bill for the interest of the residue to be paid to him during his infancy. The defendant *Freeman* by his answer insisted, that the plaintiff is not entitled to it, unless he attains his age of 21: but that it ought to accumulate: and if the plaintiff dies before 21, that it will belong to the defendant equally with the residue. The father of the plaintiff insisted, that the residue must be confined to what the testator left at the time of his death, and that the interest made after his death ought to be considered as an undisposed part, and go to him as next of kin to the testator, according to the statute of distribution: or if the court should be against him in this point, that then he is entitled to receive it for the maintenance of the plaintiff. By the Lord Chancellour *Hardwicke*: I am of opinion, that the plaintiff is not entitled to the interest that arises from this residue; and though the words *rest and residue* must be confined to what shall be found at the death of the testator, after his debts, funeral expences, and legacies are paid, yet, that the interest ought to accumulate till the plaintiff arrives at his age of 21, and as often as it

Butler v. Freeman,
3 Atk. 58.

amounts to a competent sum to be placed out by a trustee appointed by the Master. I am not quite so clear how the interest would go, if the accident should happen of the plaintiff's dying before 21, whether to the representative of the plaintiff, or to the defendant *Freeman*; but that is not necessary to be inquired into at this time. As to the father's claim, I am of opinion he has no right to the interest, because the testator has given *all the rest and residue* of his personal estate, so that he cannot be said to have left any part undisposed, and consequently can have no title to it as next of kin under the statute of distribution. For as the devise of the residue is contingent, it not vesting till the grandson's age of 21, the interest is so likewise, and must accumulate in the mean time; nor can the father by the rules of this court entitle himself to it as maintenance for the infant, because it is given by a grandfather to a grandson upon a contingency of attaining his age of 21; and as nothing is said how the produce of it shall be applied, he is not entitled as a grandson to be maintained out of the produce. The law of nature obliges only fathers to maintain their children; and unless the child, from the mean circumstances of the parent, is in danger of perishing for want, the court will not direct the interest that shall be made of a contingent legacy to be applied for that purpose: so, that unless the parent is totally incapable, or under particular circumstances, as having a numerous family of children, and is bordering upon necessity, the law of the land and of nature make it incumbent on the parent to maintain his child. In the case of *Acherley and Vernon*, 1 P. Will. 783, where the testator Mr. *Vernon* had left 6000*l.* to the plaintiff his niece, to be paid to her at her age of 21, and she insisted that the interest of this money ought to be allowed for her maintenance; Lord *Macclesfield* was of opinion, that the interest in that case ought to follow the principal, for it was a vested legacy, and payable at 21. But, there, it was a sum of money separated and detached from the rest of the estate, and a vested legacy; here, it is a contingent one, and not a specifick sum, but of the residue of his personal estates, which makes a difference between the cases; and the father likewise in the present case is possessed of a good estate and in considerable circumstances. Therefore his Lordship decreed the interest which has arisen upon the residue of the testator's personal estate since his death, or which may arise, to be paid into the hands of a trustee, to be laid out in real or government securities as often as it shall amount to a competent sum.

Heath v.
Perry,
3 Atk. 101.

The testator by his will gave 1000*l.* a-piece to five brothers and sisters (but who were no relations to him), to be paid to them at their respective ages of 21, in case they should respectively attain that age, and not otherwise; and if any of them should happen to die before they attain their respective ages of 21, that then and in such case the legacy or legacies of 1000*l.* so given to them respectively should be void. The legatees brought a bill for interest on their legacies. By Lord *Hardwicke*: Cases of this kind, how far a legatee, who is not entitled to the payment of the legacy immediately, shall have interest in the mean time, depend upon particular

cular circumstances. Some upon relationship, some upon the necessities of legatees, and most of them upon the particular penning of wills; and there is hardly one case which can be cited that is a precedent for another. Some things are certain in these cases; for if a legacy is given generally at marriage, or at 21, then the vesting and time of payment are the same, and shall not vest till marriage, or 21. To go one step further, where a legacy is actually vested, as if given to an infant payable at 21, yet it shall not carry interest, unless something is said in the will that shews the testator's intention to give interest in the mean time. But all these cases are subject to this exception, if it is in the case of a child; for then let a testator give it how he will, either at 21, or at marriage, or payable at 21, or payable at marriage, and the child has no other provision, the court will give interest by way of maintenance, for they will not presume the father so unnatural as to leave a child destitute. But in the present case, the legatees are mere strangers to the testator; and nothing shall be taken out of the estate for their benefit during their nonage.

It hath been resolved, that if one gives a legacy charged upon land which yields rents and profits, and there is no time of payment mentioned in the will, the legacy shall carry interest from the testator's death, because the land yields profit from that time. 2 P. Wms. 26.

But if a legacy be given out of a personal estate, and no time of payment mentioned in the will, this legacy shall carry interest only from the end of the year after the death of the testator. So, *Loyd v. Williams*, 2 Atk. 108.
 If a legacy be given generally by a parent to a child, whether by way of portion or not, the court will give interest from the death to create a provision for its maintenance; and if payable at a certain age, and the child not otherwise provided for, the court will give interest in the mean time before that age. 1 Vez. 310.

If a legacy be given charged upon a dry reversion, here, it shall carry interest only from a year after the death of the testator, a year being a convenient time for a sale.

If a legacy be given out of a personal estate, consisting of mortgages carrying interest, or of stocks yielding profits half-yearly, it seems, in this case, the legacy shall carry interest from the death of the testator.

If a legacy be brought into court, and the legatee have notice of it, so that it is his fault not to pray to have the money, or that the money should be put out, the legatee, in such case, shall lose the interest from the time the money was brought into court; but if the money was put out, the legatee shall have the interest which the money so put out did yield.

As to the *quantum* of interest, the determinations have been various: in the case of *Guillam and Holland*, Lord *Hardwicke* said, where a portion is charged upon land, and the will doth not mention interest, the court will not give any more than 4 *per cent.* though the legal interest is 5 *per cent.*; and this rule hath also been extended to the cases of legacies and portions charged upon personal estate. 2 Atk. 343.

In the case of *Incedon and Northcote*, Lord *Hardwicke* said at first, as no more had been allowed for many years than 4 *per cent.* interest to children for maintenance, he did not care to break through the rule: but afterwards, in consideration of the interest 3 Atk. 438.

of money being altered lately, mortgages being then at four and a half, and several at five *per cent.* he ordered the children should have four and a half *per cent.* interest.

1 Vez. 171.

In *Bryant and Speke*, Lord *Hardwicke* said, the general rule is, that legacies out of real estate carry one *per cent.* lower than legal interest; but if out of personal, because of the higher interest of money than land, they shall carry the legal interest, unless particular circumstances induce the court to vary therefrom. And this, he said, was in conformity to the ecclesiastical court, which gives legal interest upon legacies out of personal estate.

1 Vez. 308.

(a) This distinction is now at an end. Whether the legacies are charged upon real or personal estate, it is now become the established practice to allow only 4 *per cent.*—And note, although pecuniary legacies,

In *Beckford and Tobin*, it was said by the Lord Chancellour *Hardwicke*, that in general the court exercises as large a discretion as to the rate of interest upon legacies, where interest is not particularly given, as in any case; and that it is difficult to reduce it to a certain rule. The most general rule hath been, between interest of legacies charged on land, and on personal estate (a); and where nothing more, the court has said, that land never produces profit equal to the interest of money, and will follow the course of things, and give interest, where charged on land, one *per cent.* lower than the legal interest. So, it was when the legal interest was at six; but in general, where a legacy is out of personal estate, the court gives five; and unless that is taken to be a sort of rule, there will be no distinction between them.—Nevertheless, in the present case, the fund out of which the interest was to arise yielding no more than four, the court allowed but four *per cent.*

not having the addition of the word sterling, are to be paid according to the currency of the country, where the will was made, yet interest thereon is to be computed according to the course of the court, at 4 *per cent.*, and not according to the rate of interest in such country. 2 Br. Ch. Rep. 47. 3 Br. Ch. Rep. 53.

Ferrers v. Ferrers, Ca. temp. Talb. 2.

The Countess Dowager of *Ferrers* was, by settlement and will of her late husband Earl *Robert*, entitled to a jointure estate of 1000*l.* a-year, but was kept out of possession by Earl *Washington*, the son of Earl *Robert* by a former venter; and insisted upon the arrears, and interest, from the time of her husband's death; comparing it to the case of arrears of an annuity, or rent-charge, which are decreed to be paid with interest. By *Talbot*, Lord Chancellour—The arrears of an annuity or rent-charge are never decreed to be paid with interest, but where the sum is certain and fixed; and also where there is either a clause of entry, or *nomine pœna*, or some penalty upon the grantor which he must undergo, if the grantee sued at law; and which would oblige him to come into this court for relief, which the court will not grant but upon equal terms, and those can be no other but decreeing the grantor to pay the arrears, with interest for the time, during which the payment was withheld; but interest for the rents and profits of an estate was never decreed yet, the same being entirely uncertain. And though it may be said, that the lady is entitled to an estate of 1000*l.* a-year, yet that is not sufficiently certain; being only a perception of the profits of an estate, which are not to be paid at any one certain time, but only as the tenants of the land bring them in, some at one time, some at another.

A legacy

A legacy was made payable at the age of 21 years. The legatee by his guardian brought a bill against the executor for maintenance, suggesting that he had none. The executor demurred; for that the plaintiff was under age, and the legacy was not payable till 21, and therefore no cause of suit. But the demurrer was over-ruled.

Renneſey
v. Parrot,
1 Ch. Ca.
60.

The teſtator being ſeiſed of a real eſtate, and poſſeſſed of a perſonal eſtate, and having ſeveral children, deviſeth all his real and perſonal eſtate to his eldeſt ſon, charging the ſame with 1000*l.* a-piece to all his younger children, payable at their reſpective ages of 21; but in the will no notice is taken of maintenance for the younger children in the mean time. The younger children bring their bill, in order to recover intereſt, or ſome maintenance during their infancy. Upon which, the Maſter of the Rolls decreed, that the younger children ſhould recover maintenance. He obſerved, that theſe being veſted legacies, and no deviſe over, it would be extremely hard that the children ſhould ſtarve, when entitled to ſo conſiderable legacies, for the ſake of their executors or adminiſtrators, who in the caſe of their deaths would have the ſaid legacies: that in this caſe, the court would do, what in common preſumption the father (if living) would and ought to have done, which was, to provide neceſſaries for his children: that a court of equity would make hard ſhifts for the provision of children; as where younger children were left deſtitute, and the eldeſt an infant, equity would make ſuch a liberal allowance to the guardian of the eldeſt, as that he might thereout be enabled to maintain all the children; and for the ſame reaſon the court would likewiſe take a latitude in this caſe; that ſince intereſt was pretty much in the breaſt of the court, though the will were ſilent with regard to that, yet it ſhould be preſumed that the father, who gave theſe legacies, intended they ſhould carry intereſt, if the eſtate would bear it; for every one muſt ſuppoſe it to have been the intention of the father, that his children ſhould not want bread during their infancy: that for this reaſon it had been held, that though a legacy were deviſed over in caſe of the legatee's dying before 21, yet the infant legatee ought to have intereſt allowed him during his infancy, in order for his maintenance; with this difference only, that where the eſtate has appeared to be ſmall, the court, in whoſe diſcretion it always lies to determine the quantum of intereſt, has ordered the lower intereſt: and it ſeemeth, that if one, not a parent, gives a legacy to an infant, payable at 21, without any deviſe over, and the infant has nothing elſe to ſubſiſt on; the court will order part of this legacy, in order to provide bread for the infant, to be paid preſently, allowing intereſt for the ſame to the perſon paying it, out of the remaining principal; though this is done very ſparingly.

Harvey v.
Harvey,
2 P. Wms.
21.

Upon a bill for 100*l.* legacy given to a child, the defendant inſiſted upon an allowance of 16*l.* a-year, for keeping the legatee at ſchool. It was objected, that only the bare intereſt of the money ought to have been expended in his education, and not to have ſunk the principal, as in this caſe the defendant had done. But the Lord Keeper thought it fit and reaſonable to be allowed; and ſaid, the money laid out in the child's education was moſt advan-

Barlow v.
Grant,
1 Vern. 255.

advantageous and beneficial for the infant, and therefore he should make no scruple of breaking into the principal, where so small a sum was devised, that the interest thereof would not suffice to give the legatee a competent maintenance and education; but in case of a legacy of 1000*l.* or the like, there it might be reasonable to restrain the maintenance to the interest of the money.

3 Ch. Ca.

Leech v.

Leech,

H. 26 & 27

C. 2. Prec.

Ch. 195.

But if the legacy is devised over, it seemeth to be otherwise; and that the court in such case will not diminish the principal, but only allow the interest thereof to the first legatee, until the time that the legacy shall become payable.

Brewin v. Brewin, E. 1702.

3 Atk. 399.

Also a legacy in the hands of the father given to his children by a relation or other, shall not be diminished by the father; because he is obliged to maintain his own children: as in the case of *Darley* and *Darley*. A bill was brought by the plaintiff for two legacies of 50*l.* each, left to himself and his sister under the will of their grandfather, and for the interest that had been made thereof. The sister's legacy he claims by assignment from her. The defendant, being executor to the father, insists he is not obliged to account to the plaintiff for principal or interest, one hundred and five pounds being expended for putting him out apprentice, and much more than fifty pounds in the maintenance and clothing of the sister. By the Lord Chancellour *Hardwicke*: where legacies are given to a child by a relation, a father cannot make use of such legacy in maintenance of the child, but must provide for him out of his own pocket; nor can he set him out in the world, or put him out an apprentice, or clerk, with the money arising from the legacy; and if he does, he shall not be allowed it. And he ordered interest to be computed on the legacies given to the plaintiff and his sister, from the time they respectively attained their ages of 21, at 5 *per cent.* and that what should be found due for principal and interest of these legacies be paid by the defendant to the plaintiff, he having admitted assets of the father for that purpose.

Hughes v.

Hughes,

1 Br. Ch.

Rep. 386.

T. C. by his will vested his estates in trustees, to pay certain annuities, and subject thereto, to pay the rest and residue of the rents and profits, dividends and interests, for and towards the maintenance and education of all and every the child and children of his three daughters, (excepting such of his grandsons as should be in possession of real estates before devised,) share and share alike, until the youngest of his said grandchildren should attain his or her age of 21 years; and in case of the death of any of his grandchildren (before the youngest should have attained the age of 21 years) who should have married, and have issue, the child or children should be entitled to the share of the parent so dying. Upon the hearing of the cause, Lord Chancellour refused to direct the Master to consider of a proper allowance for the maintenance of the younger children of the testator's daughters; holding the residue of the rents, &c. to be an accumulating fund for the benefit of the children, and to be paid to them, when the estate became divisible; and that, until it appeared that the parents were incapable of maintaining the children, he could not order any part of the rents, &c. of the estates to be so applied.

It

It was afterwards moved, on the part of the defendants, that the minutes of the decree should be amended by inserting a reference to the Master to consider of a proper allowance to the parents for the maintenance of the children. It was stated that *J. S.* the husband of one of the daughters, had by her seven children, whom, though without allowance, he might support agreeably to his own rank, he could not in proportion to the additional fortunes derived from the testator. That the rule was, that wherever a maintenance was given by the will, the child should have it, and a case was cited, where the direction was, that a sum for maintenance should be paid to the father; and Lord *Thurlow* ordered a future maintenance to be allowed, and upon further application, ordered a sum to be paid for the maintenance of the children, prior to the first application. The Lord Chancellour said, the practice was, to refer it to the Master to inquire whether the parents were of ability to maintain the children; if not, then to report what would be a proper maintenance; and this practice did not vary where a maintenance was directly given by the will, unless in cases where it was given to the father, under which circumstances it was a legacy to him. His Lordship therefore referred it to the Master to inquire into the ability of the parents to maintain the children: and afterwards, upon petition, sums were ordered to be allowed for the purpose to *J. S.*, who was reported not of ability to maintain his children. But, although the Master made the allowance from the date of the decree, the Lord Chancellour ordered it to the date of the report.

A grandfather, having given several legacies, bequeathed the residue to his grandchildren at 21, and the produce, in the meanwhile, to trustees for their maintenance, and appointed four trustees, of whom the father was one. *J. S.*, one of the trustees, had expended 400*l.* in the maintenance of the children, previous to any report as to the ability of the parent to maintain them. The question was, Whether he should be allowed the sum so advanced, and, whether any maintenance should be allowed the children before the report? For the trustees, it was insisted, that the words of the will were imperative upon the trustees to allow a maintenance, and that this had been done in the case of *Fitzgerald v. Carey*, *Mich.* 1770. Lord Chancellour said, although where there has been a bigotted father, who would not educate the child in the protestant religion, the allowance has been made to the trustees, it was contrary to all rules, that the interest, vested in the children, should be applied to their maintenance in the lifetime of the parent: that this would amount to a gift to the parent of so much as should be necessary for the maintenance, and the father being a trustee can make no difference. He therefore ordered the reference to be only as to the ability of the parent, and what would be necessary for the future maintenance of the children. But afterwards, by consent of the children in *England* and adult, their proportions were ordered to be paid.

Lord *Clive* devised a specifick landed estate to trustees for a term of years, with remainder to his son *Robert* (his second son)

Andrews v.
Partington,
3 Br. Ch.
Rep. 60.

Clive v.
Walsh,
1 Br. Ch.
for Rep. 146.

for life, with remainders over. The trusts of the term were, to raise a maintenance till 21, then to pay him an annuity of 1000 *l.* till he should attain the age of 25 years, when the estate was to vest in possession, and to apply the savings, to form a personal fund for other purposes. He then gave his personal estate to trustees; he gave to *Robert* and each of his younger sons 30,000 *l.*, and to each of his daughters 20,000 *l.*, at 25; in the meanwhile to raise maintenances till 21, and from thence to pay 1200 *l. per annum* to the boys till 25. Lady *Clive* filed a bill to have the two allowances for the second son during his minority. Lord Chancellor—There is not sufficient in the will to extract any thing from it, but what is expressed. The trust of the term is to raise maintenances, but there is a further intent to take the profits till 25, and convert them into a personal fund for other purposes, and to provide an annuity till that age. The personal estate is to be laid out in good securities, and out of it he provides 30,000 *l.* for *Robert*, he having then no other younger son: no interest is to be allowed, but a maintenance; so that *Robert* is, as to that maintenance, in contemplation, as well as the other younger sons. The argument that he shall not have this, because he has another provision, would apply equally to the annuities from 21 till 25, and no one could say he was not to have the two annuities. He has given more by way of maintenance to the son, to whom he has given a larger estate. It must be referred to the Master, what allowance should be made, and the rest must accumulate for the use of *Robert*.

(L) Of the Executor's Assent to a Legacy.

Godolph.
Orph. Leg.
148. Off.
Ex. 27.

(a) And therefore, if a legatee takes possession of the thing devised, without the assent of the executor, he may have an action of trespass against him. Dyer, 254. Keilw. 128.

ALthough the testator disposes of goods and chattels, and sums of money, to legatees, yet they all pass to the executor, and he has them in nature of a trustee, and he alone has a (a) title in law to them, and nothing passes to the legatee, nor can any legatee take any thing to him devised without the executor's assent; for were it otherwise, it might be in the power of a legatee to subject an executor to a *devastavit*, which would discourage all persons from taking upon them the office of an executor.

Off. Ex. 29.
Godolph.
148.

Plow. 525.
(b) And is like an attornment of a tenant to the grant of a reversion.

But this matter of assent is only (b) a perfecting act for the security of the executor, for it is the will of the testator which gives the interest to the legatee, and therefore the law does not require any exact form in which it is to be made. Hence any expression or act done by the executor, which shews his concurrence or agreement to the thing devised, will amount to an assent.

March, 127.—And therefore a small matter will amount to an assent. Vern. 90. 460. 2 Vent. 358.
—And which the legatee may compel the executor to do in the spiritual court. March, 127.

As, if the executor says to the legatee, *I wish you joy of the thing devised to you*, or *I am content that you have it according to the will*; or, if one offers the executor money, or seems willing to purchase a horse, &c. devised to J. S., and the executor directs him to the legatee; or, if the executor himself offers the legatee money for the horse, &c. these and the like acts amount to an assent.

Plow. 53.
5 Co. 29.
4 Co. 18.
March, 138.

Hence it hath been held, that if a specifick legacy be devised, as three gowns, &c., and the legatee take money in satisfaction of them, that this amounts, first to a consent of the executor to the legacy, or devise of them, and then it is a sale of them by the legatee or devisee to the executor for the money *eo instanti*.

Hill. 5 Ann.
Beckett and
Ball.

And as an assent is but a perfecting act, the executor cannot, after he has once given it, revoke the same; neither can it be given on (a) condition, or on any limitation or restriction whatsoever.

March, 136.
Cro. Jac.
614, 615.
2 Vent. 360.
(a) If the
executor de-

liver to the legatee the goods bequeathed to him, to re-deliver them to him again at such a day, this is a good assent, and the words of re-delivery are void. Leon. 130, 131.

If A. devise a term to B. for life, remainder to C., and the executor assent to the devise to B., this will amount to an assent to the devise over to C., and vest the interest in him accordingly.

March, 136.
8 Co. 96.

If one is himself both executor and devisee, and he enters generally, without claim or demonstration of election, he shall have the thing devised as executor, which is the first and general authority, unless he elects to take it as devisee.

10 Co. 47.
Plow. 520.
Dyer, 367.
Cro. Eliz.
223. 2 Co. 37.

As, where a man, possessed of a long term for years, devised it to his wife for life, remainder to trustees for his son's life, &c. and made his wife executrix; it was held, that the wife took the term wholly as executrix, in the first place, till she agreed to the devise; but it being proved that she said, *she would take the term according to the will*, it was held by the court to be a sufficient assent.

Lev. 25.
Garret and
Lister.

So in a like case, where the wife said, *that the son was to have the estate after her*, and this was resolved to be a sufficient assent.

Lev. 25.

An executor may assent before probate of the will, and if there be two or more executors, the assent of any one of them will be sufficient: also, it is said, that an infant executor may assent, especially, if he be above the age of 17 years.

5 Co. 29.
Cro. Eliz.
602.
March, 136.
&c. & vide

tit. Executors and Administrators.

If a man devise a term to a child *in ventre sa mere*, provided it be a son, and if not a son, to J. S., and the child happen to be a daughter, though the executor assents, yet the daughter cannot take, because here is a condition precedent that never happened, and the executor's assent is not material where there is no devise.

Comb. 437-
8. Estwart v.
Warry, ad-
judged on a
special ver-
dict.

(M) Legacies, in what Court, and how properly recoverable.

Vide tit. Jurisdiction of the Courts Ecclesiastical, and tit. Executors and Administrators.

Dyer, 157.
Palm. 120.
Cro. Jac.
279. 364.
Cro. Car. 16.
2 Roll. Abr.
285. 2 Show.
50. pl. 36.

Cro. Jac.
279.
Brown. 34.
Bulf. 153.
Sid. 279.
Lev. 179.

Yelv. 38.
Goodwyn
and Goodwyn,
and a prohibition
granted accordingly.

(a) That by giving a bond for payment of a legacy at a certain day, it thereby becomes a duty, and is not to be considered as a legacy. 2 Vern. 31. — But by Justice Dodderidge, an obligation given for payment of a legacy does not totally destroy the nature thereof, but the legatee has it still in his election either to sue for it in the temporal or ecclesiastical court. 2 Roll. Rep. 160.

Sid. 45.
Raym. 23.
[That *assumpsit* will lie for a legacy upon a promise

by an executor in consideration of assets, was determined in *Atkins v. Hill*, Cowp. 284. *Hawkes v. Saunders*, *Id.* 289. But these cases seem to be quite overturned by a subsequent case of *Decks v. Strutt*, 5 Term Rep. 690. It is true, that in this last case, it was stated that the executor made no express promise to pay, whereas in the two former cases an *actual* promise was admitted; yet the arguments of two of the three judges who decided the last case, proceed upon general grounds, and deny the jurisdiction of the common law courts over the subject of legacy, as well where there has been an express, as where only an implied promise.]

2 Lev. 3.
Vent. 120.
S. C. Davies
and Reynier.
Sel. Caf.
Evid. 59.
11 Mod. 91.
pl. 15. See
2 Burn's
Ecclef. Law,
690.

IT is clearly agreed, that the ecclesiastical court having jurisdiction over all testamentary matters, they have, as incident thereto, consufance of legacies, and that it is the only proper court where legacies are to be sued for and recovered, except in those cases where the courts of equity claim a concurrent jurisdiction with them.

But this jurisdiction is confined to gifts of goods and chattels; and therefore if a man, by will, gives lands to be sold for payment of debts or legacies, these legacies cannot be sued for in the ecclesiastical courts, but only in a court of equity; because it is not a legacy merely of goods and chattels, but arises originally out of lands and tenements.

But if a rent be devised out of a term for years, the ecclesiastical courts may hold plea thereof; for the term for years being only a chattel, is testamentary, and consequently the rent devised thereout.

If the legatœ takes a bond from the executor for payment of the legacy, and afterwards sues him in the spiritual court for the legacy, a prohibition will be granted; for, by taking the obligation, the nature of the demand is changed, and it becomes a debt or (a) duty recoverable in the temporal courts.

Also, though the temporal courts do not directly take consufance of legacies, so as to allow of an action for the recovery of them, yet may the executor make himself liable to an action at common law, as by his promise of payment; in which case an *assumpsit* will lie.

As, where in *assumpsit* the plaintiff declared that J. S. devised a legacy to him, and made the defendant executor, and the plaintiff intending to sue him for the legacy, the defendant, in consideration of forbearance, promised to pay him; the defendant pleaded divers bonds and judgments, and *nul assêts ultra*; upon which the plaintiff demurred, and had judgment without argument; for it is not material whether he had assêts or no, for he is charged upon his own promise, in consideration of forbearance, and a forbearance of suit for a legacy is a sufficient consideration.

And

And although the spiritual court, having jurisdiction of wills and testaments, have, as incident thereto, jurisdiction of legacies, yet, if a temporal matter be pleaded in bar of an ecclesiastical demand, they must proceed in the ecclesiastical court according to the common law, otherwise they will be prohibited.

Therefore, if payment be pleaded in bar of a legacy, and there be but one witness, which the ecclesiastical court will not admit, because their law requires two witnesses, there, the temporal courts will prohibit them, because it is a matter temporal that bars the ecclesiastical demand.

row, adjudged. 3 Mod. 283. Ld. Raym. 220. 346. 2 Ld. Raym. 1161. 1172. 1211. 2 Salk. 547. pl. 1. Shotter and Friend, adjudged. Carth. 142. S. C. adjudged. — But it is not sufficient ground for a prohibition to suggest that the spiritual court objected to the credibility of a witness, nor to suggest that the plaintiff had only one witness to prove the fact, unless the party allege that he offered such proof, and it was refused for insufficiency. Carth. 143, 144.

Roll. Abr. 298, 299. Hob. 12. 12 Co. 65. Hetley, 87. 2 Inst. 608. Sid. 161. Cro. Eliz. 83. 666. Show. 158. 173. Vent. 291. Richardson and Desbor-

It is holden by my Lord Chief Justice *Holt*, that a devisee may maintain an action at common law against a tertenant for a legacy devised out of land; for where a statute, as the statute of wills, gives a right, the party, by consequence, shall have an action at law to recover it.

per Twifden, Justice. 2 Ld. Raym. 937.

[But the usual remedy in such like cases is in equity.

It is said, that where the ecclesiastical court, and a court of equity have a concurrent jurisdiction, whichever is first possessed of the cause has a right to proceed; and the same of all other courts. However, where the husband hath sued in the spiritual court for a legacy given to the wife, the court of Chancery hath granted an injunction to stay proceedings; because the spiritual court cannot compel him to make a settlement upon her.

So, where a personal legacy was given to an infant; it was holden, that the same is more properly cognizable in Chancery than in the ecclesiastical court; and if the matter had proceeded to sentence in the ecclesiastical court, yet it was proper to come into Chancery for the executor's indemnity; for in the Chancery, legatees are to give security for the money, but not in the spiritual court; and the Chancery will see the money put out for the children.

So, where there is a trust, or any thing in the nature of a trust, notwithstanding the ecclesiastical court hath an original jurisdiction in legacies, yet the Chancery will grant an injunction to stay the proceedings in the ecclesiastical court, trusts being properly cognizable only in equity. And an executor being in equity considered as a trustee for the legatee, with respect to his legacy; and as trustee, in certain cases for the next of kin, as to the undisposed surplus; hence the true ground of equitable jurisdiction in these cases.

So, where a will is suppressed or destroyed, the suit for a personal legacy may be in equity in the first instance, without resorting to the spiritual court; otherwise it would put the plaintiff upon

2 Salk. 415. pl. 1. 6 Mod. 26. S. P. per Holt, and 279. S. P. 2 Salk. 415. 2 Ld. Raym. 937. 3 Salk. 223. Toth. 114. Pr. Ch. 548. 2 Atk. 420.

1 Vern. 26.

1 Atk. 491.

1 P. Wms. 575. 544.

3 Atk. 361.

upon great difficulties : for in the spiritual court, the plaintiff must prove it a will in writing, and must likewise prove the contents in the very words, and must also prove the whole will, though the remainder of it doth not at all belong to, or regard his legacy; which the temporal courts do not put a person upon doing. Much more, when the legacy is charged both upon personal and real estate; for as to the real estate, there is no occasion to resort to the ecclesiastical court at all.

1 Roll.
Abr. 919. Legacies may be recovered in the spiritual court against *an administrator with the will annexed*, or against *an executor of his own wrong*.

1 Ch. Ca.
121. An executor may in some cases be compelled to give security to pay a legacy; as, where 1000 *l.* were devised to a person, to be paid at the age of 21 years; upon a bill exhibited against the executors, suggesting a *devastavit*, and praying that he might give security to pay the legacy when due, it was decreed accordingly.

Swinb. a.
40. Law
of Ex. 187. A testator devised 800 *l.* to an infant, to be paid by the executor when the infant should attain the age of 21 years. The infant by his guardian exhibited a bill, that the executor might give security for the payment of the money. It was decreed accordingly.

Pr. Ch. 71. A testator bequeaths his personal estate to his wife for life, and that she should leave at her death to be equally distributed between her kindred and his own. If the estate be so small, that she cannot live upon it without spending the stock, it seems, she shall not be obliged to give security; otherwise, she shall.

2 Roll.
Abr. 285. If a person possessed of a lease for years, devise that his executor out of the profits thereof shall pay to every one of his daughters 20 *l.* at their full age, the executor may be sued in the spiritual court to put in surety to pay the legacies, and no prohibition shall be granted; for this is to issue out of a chattel.

1 Atk. 505. But where 500 *l.* were given to the grand-daughter to be paid at 21, or marriage; and if she died before either of those contingencies happened, then to go over to another; it was said by Lord *Hardwicke*, as the legacy was devised over, nothing vested in the grand-daughter till one of the contingencies should happen; and therefore she was not entitled to have the legacy secured.

Strange v.
Harris,
3 Br. Ch.
Rep. 365. 'The court of Chancery will now, immediately upon the coming in of the executor's answer, order so much as he admits to have in his hands of the testator's property to be paid into the Bank. It was formerly thought necessary for the plaintiff to shew that the executor had abused his trust, or that the fund was in danger from the insolvent circumstances of the executor.]

Libel.

A Libel is (*a*) defined a malicious defamation, expressed either in printing or writing, or by signs, pictures, &c. tending either to blacken the memory of one who is dead (*b*), or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, and ridicule.

Hawk. P.C.
c. 73. § 1.
5 Mod. 165.
12 Mod.
221. Ld.
Raym. 418.
4 Read.

Stat. 149. 155. (*a*) It is termed *Libellus famosus seu infamatoria scriptura*, and from its pernicious tendency has been held a publick offence at the common law; for men not being able to bear the having their errors exposed to publick view, were found by experience to revenge themselves on those who made sport with their reputations; from whence arose duels and breaches of the peace; and hence written scandal has been held in the greatest detestation, and has received the utmost discouragement in the courts of justice. Lamb. Sax. Law, 64. Bract. lib. 3. c. 36. 3 Inst. 174. 5 Co. 125. [2 Stra. 791. (*b*) But an indictment for a libel reflecting on the memory of a deceased person cannot be supported, unless it state that it was done with a design to bring contempt on his family, or to stir up the hatred of the king's subjects against his relations, and to induce them to break the peace in vindicating the honour of the family. Rex v. Topham, 4 Term Rep. 126.]

But for the better understanding the nature of this offence, I shall consider,

(A) What shall be said a Libel: And herein,

1. How far it is necessary that it should be in Writing.
2. What Degree of Defamation will amount to a Libel.
3. What Certainty in the Matter and Application will make it a Libel.
4. Whether any Proceedings in a Court of Justice will amount to a Libel.
5. Whether any Thing of this Kind can be justified.

(B) Who shall be said a Libeller: And herein,

1. Who shall be said the Author or Composer of a Libel.
2. Who the Publisher.

(C) The Offenders how punished.

(A) What shall be said a Libel: And herein,

1. How far it is necessary that it should be in Writing.

THIS species of defamation is usually termed *written scandal*, and hereby receives an aggravation, in that it is presumed to have been entered upon with coolness and deliberation, and to

5 Co. 125.
Ld. Raym.
416.
12 Mod.
2193.

continue longer, and propagate wider and farther than any other scandal.

5 Co. 125.
Skin 123.
pl. 2.
Raym. 431.
3 Keb. 378.
But it is clearly agreed, that not only written or printed scandal comes within the notion of a libel, but it may be also applied to any defamation whatsoever, expressed either by signs or pictures; as, by fixing up a gallows at a man's door, or elsewhere; or by painting him in a shameful and ignominious manner, as, by exposing a man and his wife by a skimmington or riding, though a special custom is alleged for such practice.

Hard. P.C.
c. 73. § 3.
And since the chief cause for which the law so severely punishes all offences of this nature, is the direct tendency of them to a breach of the publick peace, by provoking the parties injured, and their friends and families, to acts of revenge, which it would be impossible to restrain by the severest laws, were there no redress from publick justice for injuries of this kind, which, of all others, are most sensibly felt; and since the plain meaning of such scandal, as is expressed by signs or pictures, is as obvious to common sense, and as easily understood by every common capacity, and altogether as provoking, as that which is expressed by writing or printing, why should it not be equally criminal?

2. What Degree of Defamation will amount to a Libel.

5 Co. 125.
Keb. 293.
Moor, 627.
Roll. Abr.
37.
[(a) As, that he hath the itch, and stinks of brimstone.
Villers v. Mansley,
2 Willf. 403.]
As every person desires to appear agreeable in life, and must be highly provoked by such ridiculous representations of him, as tend to lessen him in the esteem of the world, and take away his reputation, which, to some men, is more dear than life itself: hence it hath been held, that not only charges of a flagrant nature, and which reflect a moral turpitude on the party, are libellous, but also such as set him in a scurrilous, ignominious light (a); for these equally create ill blood, and provoke the parties to acts of revenge, and breaches of the peace.

So, where the mayor of Northampton sent the Lord Halifax a licence for keeping a publick-house. 1 Str. 422.]

Hard. 470.
Skin. 123.
pl. 2.
[2 Willf.
403.]
Hence it hath been held, that words, though not scandalous in themselves, yet if published in writing, and tending in any degree to the discredit of a man, are libellous, whether such words defame private persons only, or persons employed in a publick capacity, in which latter case they are said to receive an aggravation, as they tend to scandalize the government, by reflecting on those who are intrusted with the administration of publick affairs, which doth not only endanger the publick peace, as all other libels do, by stirring up the parties immediately concerned in it to acts of revenge, but also have a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition.

Sid. 219.
pl. 4. Keb.
73. pl. 8.
The King
v. Py.
As, where a person delivered a ticket up to the minister after sermon, wherein he desired him to take notice, that offences passed now without control from the civil magistrate, and to quicken the civil magistrate to do his duty, &c. this was held to be a libel, though no magistrates in particular were mentioned, and though

though it was not averred that the magistrates suffered those vices knowingly.

A., a gunsmith, published an advertisement in a common newspaper, that he had invented a short kind of gun, that shot as far as others of a longer size, and that he was made gunsmith to the Prince of Wales; and *B.*, another gunsmith, counter-advertised, *That whereas, &c.* reciting the former paragraph, *he desired all gentlemen to be cautious, for that the said A. durst not engage with any artist in town, nor ever did make such an experiment, except out of a leather gun, as any gentleman might be satisfied at the Cross-Guns in Long-Acre, the said B.'s house.* And the court held, that though *B.* or any other of the trade might counter-advertise what was published of *A.*, yet that that should have been done without any general reflections on him in the way of his business; that the advice to *all gentlemen to be cautious*, was a reflection on his honesty, as if he would deceive the world by a fictitious advertisement, and the allegation that he would not engage with an artist, was setting him below the rest of his trade, and calling him a bungler in general terms, and not relative to the precedent matter; and that the words, *except out of a leather gun*, was charging him with a lie, the word *gun* being vulgarly used for a lie, and *gunner* for a liar; and that therefore these words were libellous, and gave judgment accordingly; and herein the court held, that words, though not scandalous in themselves, yet being published in writing, and tending any way to the party's discredit, were actionable; and that all words were to be construed *secundum subjectam materiam*, and to be understood by the court in the same sense that others do.

[An order was made by a corporation, and entered in their books, stating that *A. B.* (against whom a jury had found a verdict with large damages, in an action for a malicious prosecution for perjury, which verdict had been confirmed in *C. B.*) was actuated by motives of publick justice, &c. in preferring the indictment. This was adjudged to be a libel reflecting on the administration of justice, for which an information was granted against the members who made the order.]

But though every species and degree of calumny and detraction of this kind are deemed odious in the eye of the law, and punishable either by civil action or criminal prosecution, in most cases, at the election of the party injured; yet the court of King's Bench, whose jurisdiction herein is founded upon the necessity of preventing quarrels and ill blood, and which deals with this offence as of dangerous consequence to, and destructive of, the peace of the nation, always exercises a discretionary power in granting an information for an offence of this nature, and will, in many cases, leave the party to his ordinary remedy; as, where the application is made (a) after a great length of time: so (b), where the matter complained of as a libel happens to be true: so (c), where the granting the information would be a discouragement to learned inquiries; or, (d) where the matter complained of was intended for reformation, not defamation.

been recent, an information would have been granted. (b) As, in the case of an apothecary, who person-

Pasch.
4 Geo. 2.
in B. R.
Farman v.
De laeey.
Burnard.
K. B. 289.
Fitzgib. 121.
2 Stra. 898.
S. C.

Rex v.
Watson,
2 Term
Rep. 199.

(a) As, in the case of the King v. Knight, Trin. 9 G. 2. in B. R. where the party, after two terms, three sessions, and one assizes, applied, the court refused to grant an information; though it was agreed, had the application

ated Dr. Crow, wrote in his name, and took a fee, which being published in a publick advertisement, a motion was made for an information against the publisher; but the truth of what was advertised being made out, the court left the prosecutor to his ordinary remedy. Hil. 1 G. 1. *The King v. Bickerston*. Str. 498. Andr. 290. Barnard. K. B. 13. [Where the libel contains pointed charges, which, if false, may be denied by the party complaining, an information will not be granted, unless the party complaining denies such pointed charges on oath. *Rex v. Miles*, Dougl. 284. *Rex v. Hafwell*, *Id.* 387. But an exculpatory affidavit is not necessary, where the party libelled is abroad, at a great distance, or the subject-matter of the charge is general imputation, or an accusation of criminal language holden in parliament. See the last case.] (c) As, for the publishing in a newspaper, that Ward's pill and drop had done great mischief in twelve different cases, and that they were a compound of poison and antimony, &c. 8 G. 2. *The King v. Roberts*. (d) As, where a person in a private letter to the party expostulates with him about some vices, of which he apprehends him guilty, and desires him to refrain from them; or where a person sends such letter to a father, in relation to some faults of his children; which are said to be not at all libellous, being acts of friendship, not designed for defamation, but reformation. 2 Brownl. 151, 152. 2 Burn's Eccles. Law, 779. But such matters published in a newspaper, though the pretence be reformation, are, it seems, libellous, as was agreed 9 G. 2. *The King v. Knight*.

The King v. Enes, 5 Geo. 2. in B. R. Andr. 229. [Rex v. Masters, Say. Rep. 122. S. P.] So, where a man advertised in a publick newspaper, that his wife had eloped from him, and cautioned all persons from trusting her; an information for a libel being moved for, it was denied, because it was the only way the husband could take to secure himself.

The King v. Jenneaur, Pasch. 8 Geo. 2. in B. R. So, where it was advertised in one of the daily papers, that Lady *Mordington* kept an assembly in *Moorfields*, and it being counter-advertised, by my lord's order, that the person calling herself Lady *Mordington* was an impostrix, and that there was no such person, except his wife, who always lived with him; the court refused to grant an information; for though she be called an impostrix, yet that relates to her as assuming the title of Lady *Mordington*, which she is alleged not to have any right to; and therefore, in this respect, she may well be called an impostrix.

The King v. Bayley, Hil. 5 G. 2. in B. R. Andr. 229. A writing was directed to General *Wills*, and the four principal officers of the guards, to be presented to his majesty for redress: the paper contained the defendant's case, that he furnished the guard at *Whitehall* with fire and candle, for which the government owed him 350*l.*, that he obtained a warrant for his money, and Captain *Carr* (the prosecutor) told him, that if he would assign the warrant, he would procure him the money: the warrant was assigned, and the money paid to *Carr*, who refused paying it to the defendant: and the question was, if an information should be granted? And the court held it no libel, but a representation of an injury, drawn up in a proper way for redress, without any intention to asperse the prosecutor; and though there be a suggestion of a fraud, yet that is no more than what is in every bill in Chancery, which was never held libellous, if relative to the subject-matter.

Cro. Jac. 91. Here it may be proper to insert the remarkable case of *Parson Prick*, who in a sermon recited a story out of *Fox's Martyrology*, that one *Greenwood*, being a perjured person, and a great persecutor, had great plagues inflicted on him, and was killed by the hand of God; whereas in truth he was never so plagued, and was himself present at that sermon; and he thereupon brought his action upon the case, for calling him a perjured person; and the defendant pleaded not guilty. And this matter being disclosed upon the evi-

dence, *Wray*, Chief Justice, delivered the law to the jury, that it being delivered but as a story, and not with any malice or intention to slander any person, he was not guilty of the words maliciously, and so was found not guilty*.

* *Qu.* If the story was not in the book?

3. What Certainty in the Matter and Application will make it a Libel.

It seems to be now agreed, that not only scandal expressed in an open and direct manner, but also such as is expressed in allegory and (a) irony amounts to a libel; and that the judges are to understand it in the same manner as others do, without any strained endeavours to find out loop-holes, or to palliate the offence, which in some measure would be to encourage scandal; as where a writing in a taunting manner, reckoning up several acts of publick charity done by one, says, *You will not play the Jew, nor the hypocrite*, and so goes on, in a strain of ridicule, to insinuate, that what he did was owing to his vain-glory; or where a writing pretending to recommend to one the characters of several great men for his imitation, instead of taking notice of what they are generally esteemed famous for, pitched on such qualities as their enemies charge them with the want of; as by proposing such a one to be imitated for his courage, who is known to be a great statesman, but no soldier; and another to be imitated for his learning, who is known to be a great general, but no scholar, &c. which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if it had directly and expressly done so.

(a) 11 Mod. 86. pl. 5.
Sec 4 Read. Stat. Law, 151.
Barnard. K. B. 305.
2 Sef. Caf. 30. 5 Co. 125. That a libel may be as well by descriptions and circumlocutions as in express terms.
Poph. 252.
Hob. 215.
Hawk. P.C. c. 73. § 4.

And from the same foundation it hath also been resolved, that a defamatory writing expressing only one or two letters of a name in such a manner that from what goes before, and follows after, it must needs be understood* to signify such a person in the plain, obvious, and natural construction of the whole, and would be perfect nonsense if strained to any other meaning, is as properly a libel as if it had expressed the whole name at large; for it brings the utmost contempt upon the law, to suffer its justice to be eluded by such trifling evasions; and it is a ridiculous absurdity to say, that a writing which is understood by every the meanest capacity, cannot possibly be understood by a judge and jury.

Hawk. P.C. c. 73. § 5.
Hurt's case.
* And on application for an information, some friend to the party complaining should, by affidavit, state the having read the libel,

and understanding and believing it to mean the party.

But it is said, that no writing whatsoever is to be esteemed a libel, unless it reflect upon some particular person; and that a writing full of obscene ribaldry (b), without any kind of reflection on any one, is not punishable at all by any prosecution at common law; but the author may be bound to his good behaviour, as a scandalous person of evil fame.

Hawk. P.C. c. 73. § 9.
[(b) But this is not law: obscene books are punishable as libels.]

Rex v. Curl, 2 Str. 788. *Rex v. Wilkes*, 4 Burr. 2527. So, books reflecting upon christianity. *Rex v. Woolston*, 2 Str. 834. Fitzg. 64. So, a treatise on hereditary right was holden to be a libel, though it contained no reflection on any part of the then government. *Reg. v. Bedford*, Gilb. Rep. K. B. 297. 11 St. Tr. 121.]

Poph. 252. But a scandal published of three or four, or any one or two of them, is punishable, at the complaint of one or more, or all of them.

254. [Rex v. Bedingfield, 2 Burr. 984.] The defendant was charged in an information with writing a libel against the Protestant religion and bishops, *innuendo* the bishops of *England*; he was found guilty; and in arrest of judgment it was offered, that the bishops libelled were not *English* bishops, nor could the *innuendo* support such construction; but the court took upon them to understand the libel in that sense, and over-ruled the exception.

The King v. Osborne, Trin. 5 G. 2. in B. R. Sef. Caf. 260. 2 Barnard. K. B. 138. 166. Kel. 230. pl. 183. An information was prayed for publishing a paper containing an account of a murder on a *Jewish* woman and her child, by certain *Jews* lately arrived from *Portugal*, and living near *Broad-street*, because the child was begotten by a Christian; and the affidavit set forth, that several persons mentioned therein, who were recently arrived from *Portugal*, and lived in *Broad-street*, were attacked by multitudes in several parts of the city, barbarously treated, and threatened with death, in case they were found abroad any more: it was objected, that no information could be granted in this case, because it did not appear who in particular the persons reflected on were; and for this was cited *The King*

versus (a) *Orme*, Trin. 11 W. 3., where an indictment was exhibited for a libel called *The Ladies Invention*, and alleged to be to the scandal of several ladies unknown; and after verdict for the king, judgment was arrested, because it did not appear who the persons reflected on were. *Sed per Cur.* Admitting that an information for a libel may be improper, yet the publication of this paper is deservedly punishable in an information for a misdemeanor, and that of the highest kind; such sort of advertisements necessarily tending to raise tumults and disorders among the people, and inflame them with an universal spirit of barbarity against a whole body of men, as if guilty of crimes scarcely practicable, and wholly incredible; and in this case was cited the case of *The King*

and *Franklin*, where, though only the word *Ministers* was used in the libel, yet, by suitable averments (b) in the information, and proof made of them to the jury, they found those ministers to be ministers of state to his present majesty, and the defendant guilty.

[(b) As to the manner of making the averments, see Rex v. Horne, Cowp. 672.]

4. Whether any Proceedings in a Court of Justice will amount to a Libel.

Dyer, 285. It seems to be clearly agreed, that no proceeding in a regular course of justice will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to publick prosecutions, in respect of their applications to a court of justice; and the chief intention of the law in prohibiting persons to revenge themselves by libels, or any other private manner, is to restrain them from endeavouring to make themselves their own judges, and to oblige them to refer the decision of their grievances to those whom the law has appointed to determine them.

Therefore it hath been resolved, that no false or scandalous matter contained in (a) a petition to a committee of parliament, or in (b) articles of the peace exhibited to justices of peace, are libellous.

(a) 1 Lev. 240.
Sid. 414.
2 Keb. 832.
(b) 4 Co. 14. 1 Hawk. P. C. c. 73. § 8.

[So, where a charge was, that the defendant in a certain affidavit before the court, had said that the plaintiff in a former affidavit against the defendant had sworn falsely; the court held, that this was not libellous; for in every dispute in a court of justice, where one by affidavit charges a thing, and the other denies it, the charges must be contradictory, and there must be affirmation of falsehood; this therefore being necessary in the course of legal proceeding, no action will lie for it.]

Astley v. Young,
2 Burr. 817.

Also, it is held, that no presentment of a grand jury can be a libel, not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper evidence for what they do, but also because it would be of the utmost ill consequence any way to discourage them from making their inquiries with that freedom and readiness which the publick good requires.

Moor, 627.
Hawk. P. C. c. 73. § 8.

Also, it is holden by some, that no want of jurisdiction in the court to which such a complaint shall be exhibited will make it a libel; because the mistake of the court is not imputable to the party, but his counsel. But herein it is said by *Hawkins*, that if it shall manifestly appear from the whole circumstances of the case, that a prosecution is entirely false, malicious, and groundless, and commenced not with a design to go through with it, but only to expose the defendant's character, under the shew of a legal proceeding, there can be no reason why such mockery of publick justice should not rather aggravate the offence than make it cease to be one, and make such scandal a good ground of an indictment at the suit of the king, as it makes the malice of their proceeding a good foundation of an action on the case at the suit of the party, whether the court had a jurisdiction of the cause or not.

2 Keb. 832.
4 Co. 14.
Hawk. P. C. c. 73. § 8.

5. Whether any Thing of this Kind can be justified.

It seems to be clearly agreed, that in an indictment or criminal prosecution for a libel the party cannot justify that the contents thereof are true, or that the person upon whom it is made had a bad reputation; since the greater appearance there is of truth in any malicious invective, so much the more provoking it is; for, as my Lord *Coke* observes, in a settled state of government the party grieved ought to complain for every injury done him, in the ordinary course of law, and not by any means to revenge himself by the odious course of libelling or otherwise.

5 Co. 125.
Hob. 253.
Moor, 627.
Hawk. P. C. c. 73. § 6.

Also, it seems now settled, that no scandal in writing is any more justifiable in a civil action brought by the party to vindicate the injury done him, than in an indictment or information at the suit of the crown; for though in actions for words, the law, through compassion, admits the truth of the charge to be pleaded as a justification, yet this tenderness of the law is not to be extended

The King v. Roberts,
Mich. 8 Geo. 2.
in B. R. agreed per Cur. in a case for pub-

lishing a
libel on Mr.
Branley,
recorder of
Warwick.
Str. 498.
S. P.

tended to written scandal, in which the author acts with more coolness; and deliberation gives the scandal a more durable stamp, and propagates it wider and farther; whereas in words men often in a heat and passion say things which they are afterwards ashamed of, and though they seem to act with deliberation, yet the scandal sooner dies away, and is forgotten; and therefore from the greater degree of mischief and malice attending the one than the other, though the law allows the party to justify in an action for words, yet it doth not for written scandal; from whence it follows, that the only favour truth affords in such a case is, that it may be shewn in mitigation of damages in an action, and of the fine upon an indictment or an information.

3 Wooddes.
180.
(a) Bull.
N. P. S.;
where
1 Saund.
120. and
2 Burr.
807. are
cited; but
those were
justifications
rather from
the occasion,
than the
truth, of the
supposed
libels, the
one being a
parliamentary,
and the
other a judicial
proceeding.
So, in the
case, 4 Co.
12. b. &c.
which was
an action of
scandalum

[However, it is advanced in a very useful compilation (a), that the defendant may justify in an action for a libel, as in a common action of slander. And with respect to libels charging a man with an indictable offence, it seems now the prevailing doctrine, that the defendant may plead in bar the truth of the defamatory paper: such a plea was allowed on demurrer (b) in the Common Pleas; and the cause being removed into the King's Bench, that court reversed indeed the former judgment, on account of the plea's being too general and indiscriminate; but no notice appears to have been taken of the question at large, except that one of the learned judges remarked, that "if the plaintiff had been a common swindler, (as alleged,) the defendant ought to have indicted him; but he had no right to libel him in that way;" which may be thought to give some countenance to what now perhaps may be called the old opinion. Still a libel may be very scandalous, and very pernicious in its effects, without charging the party libelled with an indictable offence. In that case, saith a very sensible writer, as I know of no determination, that the truth of the libel may be pleaded in justification, I am at liberty to observe, the prevalence of such an opinion would not be very seasonable, nor very conducive to the peace and welfare of society.

magnatum on the statute, the plea was a relation of circumstances to extenuate and explain the scandal, which is considered as a very distinct defence from alleging the truth of it. Poph. 67. 69. 2 Mod. 166. 1 Freem. 223. (b) J'Anson v. Stewart, 1 Term Rep. 748.

In an indictment or information for a libel, where issue is joined on not guilty, the statute of 32 G. 3. c. 60. declares and enacts, that the jurors may give a general verdict on the whole matter, and the judge shall not require them to find the defendant guilty, merely on the proof of publishing, and on the sense ascribed to the supposed libel in such complaint or information. But the statute does not express that the truth of the scandal shall be a defence, and is wholly silent as to actions of *scandalum magnatum*, or for a libel.]

(B) Who shall be said a Libeller : And herein,

1. Who shall be said the Author or Composer of a Libel.

IT has been already observed, that a libel may be expressed not only by printing or writing, but also by signs or pictures; but it seems that some of those ways are essentially necessary; and it is laid down in *Lamb's case*, that every person convicted of a libel must be the contriver, procurer, or publisher thereof.

[If a defendant has owned himself to be author of a book, *errors of the press and small variations excepted*, it is sufficient to entitle the prosecutor to have the book read, and the defendant shall be put to shew, that there were material variances.]

It hath been strongly urged, that he who writes a libel, dictated by another, is not guilty of the composing and making thereof, because it appears that another is the author or contriver: but herein the court held, that the writing being the essential part of a libel, the reducing it into writing, in the first instance, was a making, and differed from a transcribing; and, according to the report of this case, in 5 *Mod.* it was held, that if (a) one dictates, and another writes, both are guilty of making it, for he shews his approbation of what he writes. So, if one repeats, another writes a libel, and a third approves what is written, they are all makers of it, as all who concur and assent to the doing of an unlawful act are guilty; and murdering a man's reputation by a libel, may be compared to murdering a man's person, in which all who are present and encourage the act are guilty, though the wound was given by one only.

therefore if the writer could not, the crime would go unpunished.

Also, it hath been held, that transcribing and collecting libellous matter is highly criminal, though it be not found that the party composed or published it; for his having it in readiness for that purpose when occasion served, or its falling into such hands after his death as may publish it, might be injurious to the government*.

will not be a publication of a libel, if he takes a copy of it, if he never publishes it. Libel, (B. 2). Though he takes a copy, or reads it by command of his father or master. R. Mo. 813. So, if a man delivers by mistake a paper out of his study, it is not a publication, though it be a libel. R. 5 *Mod.* 167.

It is said by *Holt*, Chief Justice, that when a libel appears under a man's hand-writing, and no other author is known, he is taken in the manner, and it turns the proof upon him; and if he cannot produce the composer, it is hard to find that he is not the very man.

And it is said to have been resolved by the court, that in libels *making* is the *genus*, composing or contriving is one *species*, writing a second *species*, and procuring to be written a third *species*; and finding a man guilty of writing only, is finding him guilty of one *species* of making.

But yet in some cases the writing of a libel may be a lawful or innocent act, as by the clerk that draws the indictment, or by a student

9 Co. 59.
Moor. 813.
Lamb's case.

Rex v.
Hall, 1 Str.
416.

Carth. 405.
5 *Mod.* 163.
to 167. *Ld.*
Raym. 729.
Salk. 281.
pl. 8.
Comb. 359.
The King v.
Paine.
(a) But in
Carth. 406.
is said that
he who dic-
tated cannot
be indicted
for this libel,
because he
did not write
it, and that

Carth. 407.
2 Salk. 417.
646. pl. 13.
Ld. Raym.
414.
12 *Mod.* 218.
The King v.
Bear.—* It

Com. Dig. tit.
R. Mo.
220, 221.

2 Salk. 419.
Ld. Raym.
418.
12 *Mod.* 220.

2 Salk. 418.
Ld. Raym.
416, 417.

12 Mod. 220. student who takes notes of it, because it is not done *ad infamiam* of the party; but, abstractly considered, the writing a copy of a libel is writing a libel, because such copy contains all things necessary to the constitution of a libel, *viz.* the scandalous matter, and the writing: and it has the same pernicious consequence, for it perpetuates the memory of the thing, and some time or other comes to be published.

2. Who the Publisher.

9 Co. 59. It seems to be agreed, that not only he who publishes a libel himself, but also he who procures another to do it, is guilty of the publication; and it is held not to be material, whether he who disperses a libel knew any thing of the contents or effects of it or not, for that nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher would make him safe in dispersing them.

12 Vin. Abr. 229. pl. 5. And on this foundation it hath been constantly ruled of late, that the buying of a book or paper, containing libellous matter, in a bookseller's shop, is sufficient evidence to charge the master with the publication, although it does not appear that he knew of any such book being there, or what the contents thereof were; and it will not be presumed, that it was brought and sold there by a stranger; but the master must, if he suggests any thing of this kind in his excuse, prove it.

per Raymond, C. J. Fitzgib. 47. *Barnard. K. B.* 306. 2 Sef. Caf. 33. pl. 38. [Rex v. Almon, 5 Burr. 2687. Proof that the defendant gave a bond to the stamp-office for the duties on the advertisements in a newspaper under the statute 29 Geo. 3. c. 50. § 10., and had occasionally applied to the stamp-office respecting the duties, was holden to be sufficient evidence of his being the publisher. 4 Term Rep. 126.]

9 Co. 59. The reading of a libel in the presence of another without knowing it before to be a libel, or the laughing at a libel read by another, or the saying that such a libel is made of J. S., whether spoken with or without malice, amounts not to a publication of it.

Moor, 627. Also, it is held, that he who repeats part of a libel in merriment, without any malice or purpose of defamation, is no way punishable: but of this *Hawkins* makes a doubt, for that jests of this kind are not to be endured, and the injury to the reputation of the party grieved is no way lessened by the merriment of him who makes so light of it.

Moor, 813. But it seems to be agreed, if he who hath either read a libel himself, or hath heard it read by another, do afterwards maliciously read or repeat any part of it in the presence of others, or lend or shew it to another, he is guilty of an unlawful publication of it.

9 Co. 59. It is said by my Lord *Coke*, in the case *de libellis famosis*, to have been resolved, that if one finds a libel, (and would keep himself out of danger,) if it be composed against a private man, the finder may either burn it, or presently (*a*) deliver it to a magistrate: but if it concern a magistrate, or other publick person, the finder ought presently to deliver it to a magistrate, to the intent that by examination and industry the author may be found out and punished.

15 Vin. Abr. 88. pl. 3. (a) But it has been since said, that the not delivering it to a magistrate was only punishable in the Star-chamber, and that the bare having a libel in one's custody was no offence. 1 Vent. 31.

—But

But *vide* 2 Salk. 418. Carth. 409, 410. 12 Mod. 220. Ld. Raym. 417. where it is said to be evidence of his being the author or publisher.

It seems to be a matter of doubt, whether the sending an abusive letter, filled with provoking language, to another, will bear an action as for a libel, because here is no publication. But it seems to be clearly agreed, that the sending such letter, without other publication, is an offence of a publick nature, and punishable as such, inasmuch as it tends to create ill blood, and causes a disturbance of the publick peace; and if the bare making of a libel be an offence, whether it be published or not, as it seemeth to be holden, surely the sending of it to the party reflected on must be a much greater crime.

And on this foundation the court of King's Bench granted an information against a person for sending an abusive letter to Mr. *Bernardiston*, therein calling him rascal and fool; although he swore that he wrote this to the party himself, and never made it publick, being only a piece of private resentment. But the court held, that this method provoked persons to duelling; that the writing and sending was a good publication, and that the intent of the party shall not be explained by himself.

If one deliver a paper full of reflections on any person, in nature of a petition to a committee of parliament, to any other persons except the members of parliament, he may be punished as the publisher of a libel, in respect of such dispersing thereof among those who have nothing to do with it.

But it hath been held, that the bare printing of a petition to a committee of parliament, (which would be a libel against the party complained of, if it were made for any other purpose than as a complaint in a court of justice,) and delivering copies thereof to the members of the committee, shall not be looked upon as the publication of a libel, inasmuch as it is justified by the order and course of proceedings in parliament, whereof the king's courts will take judicial notice.

[If a man sends a libel to *London* to be published, it is his act in *London*, if the publication be there.]

(C) The Offenders how punished.

THERE can be no doubt but that a person who writes or publishes a libel is subject to the action * of the party injured, in which damages shall be recovered; and that being convicted on an indictment or information, he shall pay such fine, and also suffer such corporal punishment, as to the court in discretion shall seem proper, according to the heinousness of the crime, and the circumstances of the offender †.

P. 5 Geo. 2. Stra. 934. — † A libeller may be fined and bound to his good behaviour, on his confession in court. *Rex v. Middleton*, 9 Geo. For. 201. — At common law, on conviction upon indictment, he may be fined and imprisoned, according to the nature of the offence. 5 Co. 125. 3 Inst. 174. Cro. Car. 175. 504. — Or may be put in the pillory. 5 Co. 125. b.

4 Inst. 180.
3 Inst. 174.
Hob. 62.
215.
12 Co. 34.
Poph. 136.
Raym. 201.
Mod. 58.
Sid. 444.
Lev. 139.
240.
Keb. 931.
Skin. 123. pl. 2.
The King v. Pillborough, Mich.
5 G. 2. in B. R.
2 Bernard.
K. B. 102.
2 Kel. 58.
pl. 2.
Sand. 133.
Lev. 240.
Sid. 414.
Keb. 832.
Hawk. P.C. c. 73. § 15. and the authorities *supra*.
Vide Hardr. 470.
Rex v. Middleton, 1 Str. 77.

Cro. Car. 175 —* In an action for a libel, it must be laid to be of and concerning the plaintiff. *Lowfield v. Bancroft*,

Limitation of Actions.

(A) Of the Limitation of Actions at Common Law, and before the Statute 32 H. 8. c. 2.

(B) Of the Limitation of Real Actions pursuant to 32 H. 8. c. 2. and 21 Jac. 1. c. 16.

(C) Of the Limitation of Time in regard to Actions on Penal Statutes.

(D) Of the Limitation of Time in regard to Personal Actions, pursuant to the 21 Jac. 1. c. 16.: And herein,

1. Of Actions of Assault and Battery,
2. Of Actions of Slander.
3. Of Actions arising upon Contract and founded in *maleficio*: And herein,

1. *Of what Nature or Degree the Action must be so as to be barred by the Statute.*
2. *Whether a Trust or Equitable Demand be within the Statute:*
3. *At what Time the Right of Action shall be said to have accrued, before which the Statute can be no Bar.*
4. *In what Court the Demand must be made, or what Courts are bound by the Statute.*

(E) Of the Exceptions in the Statute 21 Jac. 1. c. 16. and what will save a Bar thereof: And herein,

1. What Actions are within the Savings of the Statutes,
2. Of the Exception in relation to Infants, &c.
3. Of the Exception in relation to Accounts between Merchants.
4. Of the Exception with relation to Persons beyond Sea.
5. Where no Executor or Administrator to sue or be sued,
6. Where no Jurisdiction to sue in, or where hindered by some Authority.

7. Where

7. Where the suing out a Writ will save the Bar of the Statute.
8. Where a Debt barred by the Statute shall be said to be revived.

(F) Of the Manner of pleading, and taking Advantage of the Statute of Limitations.

(A) Of the Limitation of Actions at Common Law, and before the Statute 32 H. 8. c. 2.

IT seems that by the common law there was no stated or fixed time as to the bringing of actions; for though it be said by (a) *Brañon*, that *omnes actiones in mundo infra certa tempora limitationem habent*; yet my Lord Coke (b) says, that the limitation of actions was by force of divers acts of parliament; also, says he, this general position of *Brañon*'s admitted of several exceptions.

(a) *Brañon*.
lib. 2. fol.
228.
(b) 2 Inst 95.
Co. Lit. 115.
4 Co. 10, 11.

But we find that by the ancient law there was a stated time for the heir of the tenant to claim after the death of his ancestor, else he lost his land, according to the feudal text, *Præterea si quis infeudatus major quatuordecim annis, sua incuria, vel negligentia, per ann. & diem steterit, quod feudi investituram a proprio domino non petierit, transacto hoc spatio, feudum amittat & ad dominum redeat*.

Spelm.
Gloss. 32.

The fixing upon this period of a year and a day, upon several other occasions, seems to have been deduced from this ancient rule, and on this occasion was pitched upon, because the services appointed seem to be annually computed; and therefore the feud was ordered to be taken up within such time as such annual services became due, else it was lost and returned to the lord. The same time that was appointed to the tenant to claim from the lord, was also appointed to make his claim upon any disseisor; and if no such claim was made, the disseisor, dying seised, cast the right of possession upon the heir. And this was to keep the same uniformity of time through the law; as also that the lord might be at a certainty who he might take for his tenant, and admit upon every descent; and since the heir of the tenant anciently lost the whole land, in case he did not take it up within time, it was fit the tenant should lose the right of possession in case he did not claim within the same time upon the disseisor, that the heir of such disseisor might be in peace, in case the person that had right did not make his claim upon him, and that from thenceforth the lord might receive him into his feud; and as upon the ancient plan of the feudal constitution, if the heir did not take up the feud within a year and a day, a desertion and dereliction was presumed; so also, if the disseisee did not claim within the same time, the right of possession was relinquished.

Spelm.
Gloss. annu
& dies 32,
33.

But for the
ancient li-
mitations,
vide Co. Lit.
114. b.
115. a.
2 Inst. 94,
95.
2 Roll. Abr.
111. Hale's
Hist. of the
Law, 122.
2 Keb. 45.

Before the 32 H. 8. c. 2. certain remarkable periods were fixed upon, within which the titles upon which men designed to be relieved must have accrued: thus in the time of H. 3. by the statute of *Merton*, c. 8. the limitation in a writ of right which was then from the time of King Henry 1. by that statute is reduced to the time of King Henry 2.; and as to assises of *Mortdaunceffor*, they were thereby reduced from the last return of King John out of *Ireland*, which was 12 *Johannis*; and assises of *novel disseisin*, a *prima transfretatione regis in Normaniam*, which was 5 Hen. 3. and which before that had been *post ultimum reditum Henric. 3. de Britannia*; and this limitation was also afterwards by the statutes *Westm. 1. c. 39.* and *Westm. 2. c. 46.* reduced to a narrower compass, the writ of right being limited to the first coronation of *Rich. 1.*

(B) Of the Limitation of Real Actions pursuant to 32 H. 8. c. 2. and 21 Jac. 1. c. 16.

2 Inst. 95.

THE limitations above-mentioned being, as hath been remarked, set periods, in process of time, of necessity grew too large; whereby, as my Lord Coke observes, many suits, troubles, and inconveniencies did arise; and therefore a more direct and commodious course was taken, which was to endure for ever, and calculated so to impose diligence on, and vigilancy in him that was to bring his action, so that by one constant law certain limitations might serve both for the time present and for all times to come.

And this was effected by 32 H. 8. c. 2. by which it is enacted, "That no person shall from henceforth sue, have, or maintain any writ of right, or make any *prescription*, *title*, or *claim* to or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his ancestor or predecessor, which hath been, or now is, or shall be seised of the said manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments, within *threescore* years next before the *teste* of the same writ, or next before the said prescription, title, or claim, so hereafter to be sued, commenced, brought, made, or had."

And it is further enacted by the said statute, § 2. "That no manner of person shall sue, have, or maintain any *assise* of *Mortdaunceffor*, *cofenage*, *ayle*, writ of entry upon *disseisin* done to any of his ancestors or predecessors, or any other *action possessory* upon the possession of any of his ancestors or predecessors, for any manors, lands, tenements, or other hereditaments, of any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his or their ancestor or predecessor, which was or hereafter shall be seised of the same manors, lands, tenements, or other hereditaments, within

"*fifty*"

"fifty years next before the *teste* of the original of the same writ hereafter to be brought."

And it is further enacted, by § 3. of the said statute, "That no person shall sue, have, or maintain any *action* for any manors, lands, tenements, or other hereditaments, of or upon his or their *own seisin or possession* therein, above *thirty* years next before the *teste* of the original of the same writ hereafter to be brought."

And further, by § 4. "That no person shall hereafter make any *avowry* or *cognizance* for any rent, suit, or service, and allege any *seisin* of any rent, suit, or service, in the same *avowry* or *cognizance* in the possession of any other, whose estate he shall pretend or claim to have, above *fifty* years next before the making of the said *avowry* or *cognizance*."

And it is further enacted by the said statute, § 5. "That all *formedons* in *reverter*, *formedons* in *remainder*, and *scire facias* upon *fines* of any manors, lands, tenements, or other hereditaments, at any time hereafter to be sued, shall be sued and taken within *fifty* years next after the title and cause of *action* fallen, and at no time after the *fifty* years passed."

Also by the said statute, § 6. it is enacted, "That if any person do sue any of the said *actions* or writs for any manors, lands, tenements, or other hereditaments, or make any *avowry*, *cognizance*, *prescription*, title or claim, of or for any rent, suit, service, or other hereditaments, and cannot prove that he or they, or his or their ancestors or predecessors, were in actual possession or *seisin* of and in the same manors, lands, tenements, rents, suits, services, annuities, commons, pensions, portions, *corodies*, or other hereditaments, at any time or times (a) within the years before limited and appointed in this present act, and in manner and form as is *aforsaid*, if the same be traversed or denied by the party, plaintiff, demandant, or avowant, or by the party, tenant, or defendant; that then, and after such trial therein had, all and every such person and persons, and their heirs, shall from thenceforth be utterly barred for ever of all and every the said writs, *actions*, *avowries*, *cognizance*, *prescription*, title, or claim hereafter to be sued, had or made, of and for the same manors, lands, tenements, hereditaments, or other the premises, or any part of the same, for the which the same *action*, writ, *avowry*, *cognizance*, *prescription*, title or claim, hereafter shall be at any time had, sued, or made."

(a) In 8 Co. 65. the statute is recited thus: That no person or persons shall hereafter make any *avowry* or *conusance* for any rent, suit, or service in the same *avowry* or *conusance*, in the possession of his or their ancestor or predecessor, &c. above *forty* years next before the making of the said *avowry* or *conusance*. [And so it is 4 Vol. 268.]

in Comyns' Digest, tit. Temps, (G. 3). But Mr. Reeves states it to be *fifty* years.

Note—This statute hath the usual sayings for infants, feme coverts, persons in prison, and beyond sea.

In the construction of this statute it hath been holden,

That in a (b) *formedon* in *reverter* or *remainder*, or on a *scire facias* on a *fine* of such nature, the demandant need not mention the statute in order to make out his title, but the tenant, if he would take advantage of it, must plead it. *rent. Moor*, 31. pl. 102. *Dyer*, 315. b. pl. 101. (b) So, in *avowry* for *rent. Moor*, 31. pl. 102. *Rel. Rep.* 50.

4 Co. 8.
And. 16.
Lit. Rep.
342.

(a) Not to a *rescous*.

cessavit for

two reasons. 1. Because this writ is not comprised within the statute. 2. Because the seisin of services is not material nor traversable in this writ. Moor, 44. pl. 135. — Whether it extends to a pension in the spiritual court, *vide* 3 Keb. 366. 392. Vent. 265. — * See *infra*, the statute of 21 Jac. 1. c. 16.

8 Co. 64. b.
Copper and
Foster, ad-
judged.

Brownl. 169.
S. C. [Mo.

31. S. P.

According

to Sir W.

Jones, this

exemption

of rent should be understood with this qualification; that the *certainty* of the rent should appear in the deed; because otherwise the *quantum* or *quality* of the rent is no more ascertained by the deed, than if there was not one existing. Therefore if the rent is created by reference to something out of the deed, as by reserving such rent as the person reserving pays over, without expressing what that is, and the latter rent not having commenced by deed is one, of which seisin is the proper proof; in such a case, seisin, as Sir W. Jones thought, is equally requisite to both rents, and, consequently, both ought to be equally deemed within the limitation of this statute. Sir W. Jon. 238.] — (b) So, this statute extends not to a new rent created by act of parliament. Cro. Car. 80, 81. 214. Lit. Rep. 42. Hetl. 28. 36. Jon. 233.

2 Vern. 255.
Collins and
Goodall.

To a bill in Chancery, to be relieved touching a rent charged upon lands by a will, the defendant pleaded the statute of limitations, and that there had been no demand or payment in forty years; and it was held, that this statute concerns only customary rents between lord and tenant, and not any rent that commences by grant, or whereof the commencement may be shewn.

Co. Lit.

115. a.

2 Inst. 95.

4 Co. 10.

Bevil's case.

8 Co. 65.

9 Co. 36.

4 Lev. 21.

(c) But although homage, fealty, and escuage be out of the statute 32 H. 8. c. 2. yet are they within the ancient statute. 2 Inst. 96.

2 Inst. 96.

4 Co. 8. b.

Winch. 32.

Hutt. 52.

2 Roll. Rep.

392.

(d) That

seisin of a superior service is a seisin of all inferior services which are incident thereto. 4 Co. 8. b. — So, seisin of fealty is a sufficient seisin of homage and escuage; for when the tenant does fealty, he swears to do all other services. 4 Co. 8. a. — So, seisin of homage is a seisin of all other services, as well inferior as superior, because in the doing thereof the tenant takes upon himself to do all services. 4 Co. 8.

— But seisin of one annual service is no seisin of another annual service; for in that case it is the folly of the lord, if he hath not an actual seisin of the other service itself, when it becomes due yearly.

4 Co. 9. a.

[This sta-
tute, so far as
regards ad-
vowsons, is

By the 1 Mar. c. 5. it is enacted, "That the 32 H. 8. c. 2. shall not extend to any writ of right of advowson, *quare impedit*, or assise of *darrein presentment*, nor *jure patronatus*, nor to any writ
" of

“ of right of ward, writ of ravishment of ward for the wardship
 “ of the body, or for the wardship of any castles, honours, ma-
 “ nors, lands, tenements, or hereditaments holden by knight’s-
 “ service, but that such suits may be brought as before the mak-
 “ ing the said act.”

no longer of
 any use;
 it being en-
 acted by 7th
 Ann. c. 12.
 that no
 usurpation

shall displace the estate of the patron, and that he may present on the next avoidance, as if there had not been any usurpation; which provision, in effect, takes away all limitations of suits about the right of patronage.]

By the 21 Jac. 1. c. 16. for quieting men’s estates, and avoid-
 ing suits, it is enacted, “ That all writs of *formedon in de-*
 “ *scender, formedon in remainder, and formedon in reverter*, at
 “ any time hereafter to be sued or brought of or for any ma-
 “ nors, lands, tenements, or hereditaments, whereunto any per-
 “ son or persons now hath or have any title, or cause to have or
 “ pursue any such writ, shall be sued and taken within twenty
 “ years next after the end of this present session of parliament;
 “ and after the said twenty years expired, no person or persons,
 “ or any of their heirs, shall have or maintain any such writ of
 “ or for any of the said manors, lands, tenements, or heredita-
 “ ments; and that all writs of *formedon in descender, formedon in*
 “ *remainder, formedon in reverter*, of any manors, lands, tene-
 “ ments, or other hereditaments whatsoever, at any time here-
 “ after to be sued or brought by occasion or means of any title,
 “ or cause hereafter happening, shall be sued and taken within
 “ twenty years next after the title and cause of action first de-
 “ scended or fallen, and at no time after the said twenty years;
 “ and that no person or persons that now hath any *right or title of*
 “ *entry* into any manors, lands, tenements, or hereditaments;
 “ now held from him or them, shall thereinto enter, but within
 “ twenty years next after the end of this present session of parlia-
 “ ment, or within twenty years next after any other title of entry
 “ accrued; and that no person or persons shall at any time here-
 “ after make any entry into any lands, tenements, or heredita-
 “ ments, but within twenty years next after his or their right or
 “ title, which shall hereafter first descend or accrue to the same;
 “ and in default thereof, such persons so not entering, and their
 “ heirs, shall be utterly excluded and disabled from such entry
 “ after to be made; any former law, &c.

“ Provided, That if any person or persons that is or shall be
 “ entitled to such writ or writs, or that hath or shall have such
 “ right or title of entry, be or shall be, at the time of the said
 “ right or title first descended, accrued, come, or fallen, within
 “ the age of one-and-twenty years, feme covert, *non compos mentis*,
 “ imprisoned, or beyond the seas; that then such person and per-
 “ sons, and his, her, and their heir and heirs, shall or may, notwith-
 “ standing the said twenty years be expired, bring his or her action,
 “ or make his or her entry, as he or she might have done before this
 “ act, so as such person and persons, or his, her, or their heir and
 “ heirs, shall within ten years next after his, her, and their full age,
 “ discovery, coming of sound mind, enlargement out of prison,
 “ or coming into this realm, or death, take benefit of and sue
 “ forth the same, and at no time after the said ten years.”

Salk. 285. pl. 19. In the construction of this statute it hath been holden, That the possession of one joint-tenant is the possession of the other, so far as to prevent this statute.

Salk. 285. pl. 19. (a) And by 4 & 5 Ann. c. 16. That a (a) claim or entry to prevent the statute of limitations must be upon the land, unless there be some special reason to the contrary.

c. 16. upon such claim or entry, an action must be commenced within one year next after the making of such entry and claim, and prosecuted with effect, otherwise of no force to avoid the statute.

Lutw. 781. Hunt and Bourn. Salk. 339. pl. 5. 2 Salk. 422. pl. 7. S. C. That if a person be barred of his *formédon*, he is not thereby hindered to pursue his right of entry which afterwards accrues to him, no more than a person, who has several remedies, and discharges one of them, is excluded thereby from pursuing the others.

2 Salk. 421. pl. 5. said to have been twice so ruled by Holt. If *A.* has had possession of lands for twenty years without interruption, and then *B.* gets possession, upon which *A.* is put to his ejectment; though *A.* is plaintiff, yet the possession of twenty years shall be a good title in him, as if he had still been in possession; because a possession for twenty years is like a descent which tolls entry, and gives a right of possession, which is sufficient to maintain an ejectment.

Salk. 423. pl. 10. That if one tenant in common receives the whole profits for twenty years, or more, yet this does not bar his companion; for the statute of limitations never runs against a man but where he is actually ousted or disseised.

Meor. 410. It has been ruled that copyholds are within the statute of limitations, because an act made for the preservation of the publick quiet, and no ways tending to the prejudice of the lord or tenant.

Comp. Incumb. 429. But ecclesiastical persons are not bound by any of the statutes of limitations, because it would be a side-wind to evade the statutes made to prohibit their alienations.

[In the year 1772, an attempt was made to limit the claims of the church; but happily failed.]

9 Geo. 3. c. 16. § 1. 19. Neither was the crown bound by any of these statutes, the ancient doctrine being *nullum tempus occurrit regi*. But by a late statute, the crown is barred from recovering any estate or hereditaments, (other than liberties or franchises,) where the title did not first accrue within the last sixty years.]

(C) Of the Limitation of Time in regard to Actions on Penal Statutes.

All popular actions were limited to a certain time by 7 H. 8. c. 3. which is repealed by this statute.

BY the 31 *Eliz. c. 5. § 5.* it is enacted, " That all actions, suits, bills, indictments, or informations, which shall be brought for any forfeiture upon any statute penal, made or to be made, whereby the forfeiture is or shall be limited to the queen, her heirs and successors only, shall be brought within two years after the offence committed, and not after two years; and that all actions, suits, bills, or informations, which shall be brought for any forfeiture upon any penal statute, made or to be made, except

"except the statute of tillage, the benefit and suit whereof is or shall be by the said statute limited to the *queen*, her heirs or successors, and to any other that shall prosecute in that behalf, shall be brought by any person that may lawfully sue for the same within one year next after the offence committed; and in default of such pursuit, that then the same shall be brought for the queen's majesty, her heirs or successors, any time within the two years after that year ended; and if any action, suit, bill, indictment, or information, shall be brought after the time so limited, the same shall be void: And it is provided, that where a shorter time is limited by any penal statute, the prosecution must be within that time."

By the 18 *Eliz. c. 5. § 1.* it is enacted, "That upon every information that shall be exhibited on any penal statute, a special note shall be made of the very day, month, and year of the exhibiting thereof into any office, or to any officer which lawfully may receive the same, without any antedate thereof to be made; and that the same information be accounted and taken to be of record from that day forward, and not before; and that no process be sued out upon such information, until the information be exhibited in form aforesaid, &c. and that every clerk, making out process contrary to this act, shall forfeit 40s."

It is further enacted by 21 *Jac. 1. c. 4. § 3.* "That no officer shall receive, file, or enter of record, any information, bill, plaint, count, or declaration, grounded on any penal statute (being within the provision of the said statute of 21 *Jac. 1.*), until the informer or relator hath first taken a (a) corporal oath before some of the judges of the court, that he believes, in his conscience, the offence was committed within a year before the information or suit within the county where the said information or suit was commenced," &c.

erroneous. Cro. Car. 316. & vide 2 Inst. 192. 4 Inst. 272.—But *quære*, whether the court on motion will not set aside such process as having issued contrary to the directions of the statute? Salk. 376. pl. 19.—* In actions the oath is not now used; and *quære*, if in criminal prosecutions? *

(a) It hath been adjudged, that if an officer receive an information without such previous oath, yet the proceedings on it are not

In the construction of these statutes it hath been holden, That the 21 *Jac. 1. c. 4.* does not extend to any offence created since that statute; so that prosecutions on subsequent penal statutes are not restrained thereby, but that statute is to them as it were repealed *pro tanto*.

Salk. 372. pl. 13. 5 Mod. 425.

That if an offence prohibited by any penal statute be also an offence at common law, the prosecution of it, as of an offence at common law, is no way restrained by any of these statutes.

Hob. 270. 4 Mod. 144.

That if an information *tam quam* be brought after the year on a penal statute, which gives one moiety to the informer, and the other to the king, it is nought only as to the informer, but good for the king.

Cro. Car. 331. Cro. Jac. 366. & vide Dalif. 60.

That if a suit on a penal statute be brought after the time limited, the defendant need not plead the statute, but may take advantage of it on the general issue †.

Show. Rep. 353.—† For the statute says the

same shall be void, consequently, the party does not owe the penalty demanded, the informer, in such case, not having a right to demand the penalty.

Cro. Eliz. 645. That the party grieved is not within the restraint of these statutes, but may sue in the same manner as before.

Noy, 71.

3 Leon. 237. Show. Rep. 354. and Carth. 233. S. P. That where the penalty is given to the party alone, this is out of the statute 31 Eliz. c. 5. but *per Holt*, if given to the king and party separately, it seems within the statute; but hercof the other judges doubted.

Show. 353, 354. It seems doubtful, whether a suit by a common informer on a penal statute, which first gives an action to the party grieved, and in his default, after a certain time, to any one who will sue, be within the restraint of these statutes.

Carth. 232. It has been held by three judges, that the suing out a *latitat* within the year was a sufficient commencement of the suit to save the limitation of time on a penal statute, because the *latitat* is the original of *B. R.* and may be continued on record as an original. But *Holt* held otherwise, for the action being for a penalty given by a statute, the plaintiff might have brought an action of debt by original in *B. R.*, because the statute gives the action; and he held, that there was a difference between a civil action and an action given by statute; for in the first case the suing out a *latitat* within the time, and continuing it afterwards, will be sufficient; but in the other case, if the party proceeds by bill, he ought to file his bill within time, that it may appear so to be upon the record itself.

2 Ld. Raym. 833. Accordingly, in two subsequent cases, it was holden to be a good commencement of the suit in a penal action. *Bridges v Knapton*, and *Hardiman v. Whitaker*, cited in 2 Burr. 950. 3 Burr. 1423. Cowp. 454. But if it be replied to a plea of the statute of limitations, the defendant, in order to maintain his plea, may aver the *real* time of suing it out, in opposition to the *teste*. 2 Burr. 950. 3 Burr. 1423.]

Trin. 3 Car. 2. in C. B. Greenwood v. Scott.

In debt *qui tam* on the statute 1 H. 5. c. 4. for practising as an attorney during the time he was under-sheriff, the point was on the 31 Eliz. c. 5. which limits informers and plaintiffs in popular actions to a year; the defendant in this case was taken upon a *testatum cap.* that bore *teste* 13 January, when his office expired in November was twelvemonth before, and so a year and two months after his offence; but by antedating the original, and making it of *Mich.* term before, it was brought within the year; and *North* and *Wyndham* said it was well warranted by the practice of the court, and therefore they would make no rule to stop the filing of the original; but *Atkins* was against it, and said it was nothing but a practice to evade the statute of 31 Eliz. c. 5.

2 Hawk. P. C. c. 26. § 50.

Serjeant *Hawkins* makes it a question, Whether the clause in 31 Eliz. c. 5. § 4. by which it is enacted, *That nothing in the said act contained shall extend to champerty, king's customs, or forestalling, &c. but that every such offence may be laid in any county, any thing in the said act to the contrary notwithstanding*, doth except the said offences out of the above recited clause, relating to the time within which suits on penal statutes must be brought; for the words above mentioned, *viz. but that every such offence may be laid in any county*, seem to restrain the generality of the precedent words, which say, that nothing in the act contained shall extend to such offences.

(D) Of the Limitation of Time in regard to Personal Actions, pursuant to the 21 Jac. 1. c. 16.: And herein,

1. Of Actions of Assault and Battery.

BY the 21 Jac. 1. c. 16. "All actions of trespass of assault, "battery, wounding, imprisonment, or any of them, shall be "commenced and sued within *four* years next after the cause of "such actions or suits, and not after."

It seems, that if a man brings trespass for beating his servant. *per quod servitium amisit*, this is not such an action as is within this branch of the statute, being founded on the special damage. Salk. 206. Pl. 5. 5 Mod. 74. Ld. Raym. 831.

If to an action of assault, battery, and imprisonment, the defendant pleads, as to the assault and imprisonment, the statute of limitations, without answering particularly to the battery, otherwise than by using the words *transgressio predicta*, it is sufficient, for these words are an answer to the whole *. Lev. 31. * But the general form and best mode of pleading is, to say, not guilty of the trespass aforesaid, &c.

In trespass for assault and battery, the defendant pleaded *non culp. infra sex annos* by mistake, and not according to the statute, which is but four years; and upon demurrer it was adjudged an ill plea; for if it be considered as at common law, there was no such plea; if on the statute, the act is not pursued; and the defendant could not take issue on it, for *quod est culp. infra sex annos* is an issue immaterial, because it may be the jury might find him not guilty *infra quatuor annos*, but guilty *infra sex annos*. 2 Salk. 423. pl. 11. Blackmore v. Tiddler. 6 Mod. 240. S. C. 2 Ld. Raym. 1099. S. C.

2. Of Actions of Slander.

By the 21 Jac. 1. c. 16. § 3. it is enacted, "That all actions "on the case for words shall be commenced and sued within *two* "years next after the words spoken, and not after."

In the construction of this branch of the statute it hath been holden,

That an action of *scandalum magnatum* is not within the statute. Lit. Rep. 342. 3 Keb. 645.

That it extends not to actions for slander of title, for that is not properly slander, but a cause of damage, and the slander intended by the statute is to the person. Cro. Car. 141. Law and Harwood, C. adjudged. Ley, 82. Palm. 530. Jon. 196. S. C. adjudged.

That if the words are of themselves actionable, without the necessity of alleging special damage, although a loss ensues, yet in this case the statute of limitations is a good bar; but if the words at the time of the speaking of them are not actionable, but a subsequent loss ensues, which entitles the plaintiff to his action, in such case the statute is no bar. Sid. 95. Saunders v. Edwards. Raym. 61. S. C. & vide 3 Mod. 111. S. C. cited.

Sid. 95.
Selk. 206.
pl. 5.
S. P. And

that it was incumbent upon the plaintiff to prove the special damage; otherwise the action would not have lain for the words.

Cro. Car.
163. Topfal
and Ed-
wards, ad-
judged on
the branch
of this sta-
tute that says,

Also, for calling a man thief, and procuring him to be indicted and imprisoned for felony, and the defendant is found guilty of the whole; the statute in this case seems no bar, for the action is not for words barely, but is an action upon the case in nature of a conspiracy.

tute that says, that for slanderous words the plaintiff shall have no more costs than damages, &c.

Sid. 95.

That if an action for words be founded upon an indictment, or other matter of record, it is not within the statute, but such action may be brought at any time.

Keib. 82c.
918.
Lidiate and
Buttle.

In an action for words, the defendant pleaded *non locutus est verba prædicta infra duos annos*; and upon a special demurrer it was objected, that it ought to have been *non culp. infra duos annos*; for, as it is, it may be, the defendant spoke the substantial words of the slander, and yet did not speak all the words; and yet the plaintiff could not have a verdict upon this issue; as, in an action of debt for 10*l.*, if the defendant says *non debet* the 10*l.*, without adding *nec aliquem inde denarium*, it would be naught: but the court held the cases not alike; for in an action of debt, every penny that stands in demand is of equal weight; but here the action is founded upon the substantial words only, and the *verba prædicta* shall refer only to them; and it was held well enough.

3. Of Actions arising upon Contract and founded in *maleficio*: And herein,

1. Of what Nature or Degree the Action must be so as to be barred by the Statute.

By the 21 Jac. 1. c. 16. § 3. it is enacted, “ That all actions
“ of trespasss *quare clausum fregit*, all actions of trespasss, detinue,
“ action *sur trover*, and replevin for the taking away of goods and
“ cattle, all actions of account, and upon the case, other than
“ such accounts as concern the trade of merchandize between
“ merchant and merchant, their factors or servants, all actions
“ of debt grounded upon any lending or contract without spe-
“ cialty, all actions of debt for arrearages of rent, and all actions
“ of assault, menace, battery, wounding, and imprisonment, or any
“ of them, which shall be sued or brought at any time after the
“ end of the then session of parliament, shall be commenced and
“ sued within the time of limitation hereinafter expressed, and
“ not after; that is to say, the said actions upon the case, (other
“ than for slander,) and the said actions of account, and the said
“ actions for trespasss, debt, detinue, and replevin for goods or
“ cattle, and the said action of trespasss *quare clausum fregit*, with-
“ in

" in three years next after the end of the then session of parliament, or within *six* years next after the cause of such actions or suit, and not after; and the said actions of trespasss, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of the then session of parliament, or within *four* years next after the cause of such actions or suit, and not after; and the said action upon the case for words, within one year after the end of the then session of parliament, or within *two* years next after the words spoken, and not after.

" Nevertheless, that if in any the said actions or suits judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after (a) reverse the outlawry, that in all such cases, the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.

(a) Whether reversed by plea or writ of error, not material, Cro. Car. 294.

" *Provided*, That if any person or persons, that is or shall be entitled to any such action of trespasss, detinue, action *sur trover*, replevin, actions of accounts, actions of debt, actions of trespasss for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, be or shall be, at the time of any such cause of action, given or accrued, fallen or come, within the age of twenty-one years, feme *covert*, non *compos*, imprisoned, or beyond the seas; that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discover, of *sane* memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done."

Wingh. 82. Jon. 312.

Here we shall consider and set down such cases, about which there hath been any contest, as to the actions being grounded on a contract or lending, as the statute speaks; those by (b) speciality, as all others of a superior nature, being plainly excepted out of the statute.

(b) But though a bond or specialty be out of the statute, yet it seems to

be the practice at this day, where an action is brought on a bond of twenty years standing, and on which no interest has been paid for that time, to admit the defendant on a plea of *solvit ad diem*, to give this matter in evidence, which, from the length of time, will be presumptive proof of payment. — So, in Chancery, an obligee on a bond of twenty years standing was refused any relief. Chan. Rep. 73. 88. 106. [Vide tit. Evidence, 2 Vol. 660.]

And to this purpose it hath been adjudged, that an action of debt on the 2 & 3 E. 6. c. 13. for not setting out tithes, is not within the statute, the action being grounded on an act of parliament, which is the highest record.

Cro. Car. 513. Talory and Jackson. Sand. 38. 2 Keb. 462.

2 Sand. 66. Sid. 305. 415. Keb. 95.

Hutt. 109. So, it hath been adjudged, that an action of debt for the arrears of rent reserved on a lease by indenture is out of the statute, the lease by indenture being equal to a specialty.
 Freeman and Stacy.
 Sand. 38.
 S. C. cited. 2 Sand. 66. S. C. cited, and S. P. admitted; and there said, that the statute extends to rent reserved on parol leases only.

Sand 37. Also it hath been adjudged, that an action of debt for an escape is not within the statute, not only because it is founded in *maleficio*, and arises on a contract in law, which is different from those actions of debt on a lending or contract mentioned in the statute, but also because it is grounded on the 1 R. 2. c. 12. which first gave an action of debt for an escape (a), there being no remedy for creditors before but by action on the case.
 Jones v. Pope. Lev. 10. S. C. adjudged.
 2 Keb 93. S. C. and Sid. 305. S. C. where it is said, that an action on the case, for an escape is within the statute; and by Wyndham, delt upon a tally is not within the statute. (a) For this vide 2 Inst. 383. and title Escape.

Mod. 245. So, it hath been adjudged, that this statute cannot be pleaded to an action of debt brought against a sheriff for money by him levied on a *feri facias*, because the action is founded in *maleficio*, as also upon the judgment on which the *feri facias* issued, which is a matter of record.
 Cockram v. Welby, 212. and 2 Show. Rep. 79. S. C. 2 Mod. 212. S. C.

2 Sand. 64. It hath been adjudged, that an action of debt on an award under the hand and seal of the arbitrator, though the submission was by parol, is not within the statute; for though in strictness the award cannot be said to be equal to a specialty, yet by being under hand and seal it becomes matter of that notoriety, that it cannot be liable to any of the inconveniencies the statute was made to prevent; such as perjury in witnesses, and the oppression of defendants when their witnesses are dead, or vouchers lost. Also, it was never intended that the statute should extend to all kinds of actions of debt, but only to those which arose on a *contract* or *lending*.
 Sid. 415. Lev. 273. 2 Keb. 462. 497. 533. S. C.

Hutt. 109. It hath been adjudged, that the statute does not extend to the writ *de rationabili parte bonorum*, founded on the custom of *Nottingham*, although it conclude in the *detinet*; for this is an original writ in the register; and though it conclude in the *detinet*, is yet a different action to the common action of *detinue* mentioned in the statute, which being frequent in practice, is the *detinue* plainly intended by the statute, and not this, which, being founded on a custom, seldom happens; and as the statute is in derogation of the common law, it ought to be construed strictly.
 Sherwin and Cartwright. Lit. Rep. 341. S. C. adjudged.
 Sand. 37. 2 Sand. 64. S. C. cited, and admitted to be law.

2 Keb. 536. An action of debt for a fine of a copyholder is not within the statute.
 Lev. 273.

2 Vern 540. If a man recovers a judgment or sentence in *France* for money per curiam. due to him, the debt must be considered here only as a debt by simple contract, and the statute of limitations will run upon it.

2 Lev. 166. It seems, that to an *assumpsit* brought by the assignees of a bankrupt for a debt due to the bankrupt, this statute is a good bar; for though the assignment is by force of an act of parliament, yet the assignees stand only in the place of the bankrupt, and can have no other right or remedy than he had.
 3 Keb 645. Comb. 70.

It hath been adjudged, that this statute is a good plea in bar to an *assumpsit* brought by an attorney for his fees; for though the attorney be of record yet his fees are not.

3 Lev. 367.
Ld. Raym.
Oliver and
Thomas.
Carth. 3.
Renew v.
Axton.
(a) Carth.
226. ad-
judged.

It hath been adjudged, that this statute is a good bar to an action brought against the drawer of a bill of exchange; and that such bill is not of as high a nature as a specialty, (a) neither is it within the exception in the statute relating to merchants' accounts.

2. Whether a Trust or Equitable Demand be within the Statute.

It seems clearly agreed, that, though the statutes of limitations bind the courts of equity, yet a trust (b) is not within these statutes.

March, 129.
2 Salk. 224.
pl. 12.
[(b) But

the rule of equity, that the statute of limitations does not bar a trust estate, holds only as between *cestui que trust*, and trustees, not between *cestui que trust* and trustee on one side, and strangers on the other; for that would be to make the statute of no force at all; because there is hardly any estate of consequence without such trust, and so the act would never take place: therefore, where a *cestui que trust* and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both. Per Lord Hardwicke, in the case of Llewellyn v. Mackworth, 2 Eq. Ca. Abr. 579. pl. 8. See too Townshend v. Townshend, 1 Br. Ch. Rep. 554.]

And therefore, where the plaintiff, who was the son and executor of Ch. Just. Heath, who was made chief justice at Oxon during the difference between the king and parliament, but never sat at Westminster-hall, exhibited a bill against the defendants, prothonotaries of the K. B. at that time, to have an account of the money, &c. received by them during that time by an implied trust *virtute officii*; to which the defendants pleaded the statute of limitations; the plea was, upon argument, over-ruled.

Chan. Ca.
20. Sir Ed-
ward Heath
v. Henley,
& al.
2 Ld. Raym.
1204.

So, where the plaintiff exhibited a bill to have an account of money received by the defendant from his father, (whose executor he was,) who gave it to him to compound for his estate, sequestered for delinquency at Goldsmiths-hall; it was ordered accordingly, the court declaring it a trust, and therefore not within the statute of limitations.

2 Chan. Ca.
26. Sheldon
v. Weldman.

So, where my Lady Hollis lent 100*l.*, and in the note which was given for it mention was made, that it should be disposed of as my Lady should direct; and a bill being exhibited for it, the court held it a *depositum* or trust, and decreed payment of it; though otherwise it had been barred by the statute of limitations.

2 Vent. 345.

A charity is not barred by length of time, nor within the statute of limitations.

2 Vern. 399.

So, it hath been held, that a legacy is not within the statute of limitations.

Vern. 256.

It seems to be the doctrine of courts of equity, that mortgages are not within the statute of limitations; yet, where a man comes in at an old hand, it hath been sometimes decreed, that the possessor should account no farther than for the profits made in his own time, to discourage the stirring in such dormant titles. Also the courts have allowed length of time to be pleaded in bar, where the mortgaged estate hath descended as a fee without entry or claim from the mortgagor, and where the possessor would

Chan. Ca.
102. but
now by the
7 Geo. 2.
c. 20. the
redemption
of mortgages
is expressly
limited to
20 years,
which vide

tit. Mort- would be entangled in a long account; and in these cases the
gages. [And statute of limitations hath been mentioned as a proper direction
therefore, to to go by.
a bill to re-
deem a mortgage, if the mortgagee has been in possession twenty years, the statute of limitations may be
pleaded. Aggas v. Pickerell, 3 Atk. 225. And indeed a demurrer has been allowed in this case, where
the possession has appeared upon the face of the bill, 3 P. Wms. 287. note B. 1 Vern. 418. Bunb. 34.
though later cases seem to be to the contrary. Aggas v. Pickerell. *ubi supra*. Deloraine v. Smith, 3 Br.
Ch. Rep. 634.]

3. *At what Time the Right of Action shall be said to have accrued,
before which the Statute can be no Bar.*

Godb. 437.
Fenton v.
Emblers,
1 Bl. Rep.
353.]

This statute cannot be a bar, unless the six years are expired
after there hath been complete cause of action; as, if a man pro-
mise to pay 10*l.* to *J. S.* when he comes from *Rome*, or when he
marries, and ten years after *J. S.* marry, or come from *Rome*,
the right of action accrues from the happening of the contingen-
cy, from which time the statute shall be a bar, and not from the
time of the promise.

Godb. 437.
Shutford v.
Faroughs,
adjudged.

So, in an action on the case, wherein the plaintiff declared, that
in consideration that he would forbear to sue the defendant for
some sheep killed by his (the defendant's) dog, the defendant
promised to make him satisfaction upon request, and that such a
time he requested, &c.; it was held; that the right of action ac-
crued from the request, and not from the time of killing the
sheep: and that therefore the defendant could not plead the
statute of limitations, the request being within six years,
though the killing the sheep, and promise of satisfaction, was
long before.

127. 48.
Webb and
Martin.
Sid. 65.
Keb. 177.
S. C.

So, in *assumpsit*, in consideration that the plaintiff would deliver
to the defendant such a deed, the defendant promised, that he
would re-deliver it to him on request; and also in consideration
that he had, upon request, delivered to him another deed, the
defendant promised to pay him 40*l.*, and alleges, that he had
delivered to him the first deed, and although at such a day af-
terwards he made request, yet he had not re-delivered the first
deed, nor paid the 40*l.*: the defendant pleads the statute of
limitations, and that he did not promise within six years before
the action brought; whereupon the plaintiff demurs; for the
cause of action, as to the first deed, did not arise upon the pro-
mise, but upon the refusal after request; and the request was
within six years; and so held the court.

2 Salk. 422.
pl. 9. 2 Ld.
Raym. 838.
Gould and
Johnson.
[So, in equi-
ty. 3 Atk.
70.] (a) For
this *vide* 1
Vent. 191.
3 Keb. 613.
7 Med. 99.
Wortlev
Mountague

So, in *assumpsit*, in consideration that the plaintiff, at the defend-
ant's request, would receive *A.* and *B.* into his house *ut hospites*,
and diet them, the defendant promised, &c., *non assumpsit infra sex*
annos was pleaded; the plaintiff demurred, and held no plea; for
the defendant cannot in such case plead *non assumpsit infra sex*
annos (*a*), but *actio non accrevit infra sex annos*; for it is not material
when the promise was made, if the cause of action be within six
years, and the dieting might be long afterwards.

An executor, several years before the action brought, left some
household stuff in the house, by the consent of the heir, who used
them

them after; and within six years of the action brought, the executor demands the goods, and the heir refused to let him have them; whereupon trover was brought, and the statute of limitations pleaded. And *per cur.*, the user before the demand was no conversion, nor evidence of it, for it was the consent of the executor till then, and the demand being within six years, the refusal which ensued it, and is the only evidence of a conversion in the case, was within the six years; and (a) where a trover is before six years, and a conversion after, the statute cannot be pleaded.

v. Lord
Sandwich.

(a) But for
this *vide*
Cro. Car.
245-6. 333.
Jon. 252.
3 Mod. 111.

In an action upon the case against an executor, the plaintiff declares, that upon a marriage treaty it was agreed between the plaintiff and testator, that he should pay to the plaintiff 100 l., and whilst that should be unpaid he should pay the plaintiff 10 l. *per annum*, which agreement was made *anno* 1618, and the action was brought for all the arrears by the space of 28 years. The defendant pleaded the statute of limitations; and on demurrer it was held, that all could not be barred by the statute; and therefore the plaintiff had judgment.

Allen, 62.
Harvey and
Thorne
adjudged,
nobody ap-
pearing for
the defend-
ant.

Trespass for imprisoning the plaintiff, and detaining him in prison from 32 *Car.* 2. till the 3d of *April* 4 *Jac.* 2. The defendant pleaded as to all till 32 *Car.* 2. such a day, *non culp. infra quatuor annos*, and as to the rest, a plaint, and *capias* issued; the plaintiff demurred. *Et per curiam*, though the imprisonment be complained of as one continued imprisonment, yet the defendant may divide the time, and plead the statute as to part; and the plaintiff may reply the continuance; therefore as to this, judgment was given against the plaintiff upon his demurrer, but for him as to the rest, because the *capias* was awarded by the court *ex officio*, and it did not appear that the defendant meddled in it.

2 Salk. 420.
Pl. 3.
Coventry v.
Apsley, &
vide 3 Mod.
110.
Comb. 26.

In case of seamen, the duty does not arise from the contract, but from the service done; and therefore though the contract be above six years, if any part of the service be within that time, it is out of the statute.

6 Mod. 26.

[A bill of exchange was drawn payable at a certain future period, for the amount of a sum of money lent by the payee to the drawer at the time of drawing the bill. The payee was allowed to recover the money on an action for money lent, although six years had elapsed, since the time when the loan was advanced; the statute of limitations beginning to operate only from the time when the money was to be repaid, that is, when the bill became due.]

Wittersheim
v. Countess
Dowager of
Carlisle,
1 H. Bl. Rep.
631.

4. In what Court the Demand must be made, or what Courts are bound by the Statute.

It is clearly agreed, that the statute of limitations is a good plea in a court of equity; but it seems the safest way for him who pleads it, in his answer, also to say, that he has paid the money, because otherwise the court supposes a trust between the plaintiff and

March, 129.
2 Salk. 424.
pl. 13.

and defendant, and that the money is a *depositum* in the hands of the defendant for the benefit of the plaintiff; and the statute of limitations, as has been observed, does not reach trusts.

Gardner v. Griffith,
2 P. Wms.
403.
Boteler v. Allington,
3 Atk. 458.

[To a bill, on an equitable title to a presentation to a living, seeking to compel the defendant to resign, plenarty six months before the bill was filed may be pleaded in bar; the statute of *Westminster* the second being considered for this purpose as a statute of limitation, in bar of an equitable as well as of a legal demand. But if a *quare impedit* is brought before the six months are expired, though the bill is filed after, it may in some cases be a ground for the court to interfere, and, consequently, plenarty would not in such cases be pleadable in bar.

South Sea Company v. Wymondsell, 3 P. Wms. 143.
But even at law,

If a bill charges a fraud, and that the fraud was not discovered till within six years before the filing of the bill, the statute of limitations is not a good plea, unless the defendant denies the fraud, or avers, that the fraud, if any, was discovered within six years before filing the bill.

fraud will not prevent the statute of limitations from operating, though discovered by the plaintiff within six years before the commencement, unless it can be shewn that the defendant was consant of it. *Brec v. Holbech*, Dougl. 655.

Bicknell v. Gough,
3 Atk. 558.

Upon a bill for discovery of a title, charging fraud, and praying possession, the statute of limitations alone is not a good plea to the discovery; for the defendant must answer to the charge of fraud.

Mackworth v. Clifton,
2 Atk. 51.

Although the statute of limitations is a bar in equity to the claim of a debt, it is not to a discovery when the debt became due; for if that is set forth, it will appear to the court, whether the time limited by the statute is elapsed.

Hollingshead's case,
1 P. Wms.
742.

The statute of limitations may be pleaded to a bill of revivor, if the proper representative does not proceed within six years after abatement of a suit, provided there has been no decree.]

6 Mod. 25,
26. 76.
2 Salk. 424.
pl. 12.
3 Keb. 366.
392.

But it seems to be agreed, that the statute of limitations is no plea in the court of Admiralty, or spiritual court, where they proceed according to their law, and in a matter in which they have consufance.

6 Mod. 26.

Therefore it hath been agreed, that for a suit upon a contract *super altum mare*, no prohibition should go upon their refusal of a plea of the statute of limitations.

2 Salk. 424.
pl. 12.

So it has been held not to be pleadable to a proceeding in the spiritual court, *pro violenta manu iniectione super clericum*, because the proceeding is *pro reformatione merum*, and not for damages.

2 Salk. 424.
pl. 12.
6 Mod. 25.

It has been doubted, whether, to a suit in the Admiralty for mariners' wages, this statute is a good plea; because it is said, that this is a matter properly determinable at common law; and the allowing the Admiralty jurisdiction therein, only a matter of indulgence.

But this is now settled by the 4 and 5 Ann. c. 16. by which it is enacted, "That all suits and actions in the court of Admiralty

“ for seamen’s wages, shall be commenced and sued within six
“ years next after the cause of such suits or actions shall accrue,
“ and not after.”

[With respect to certain suits in the spiritual court, it is enacted by *℞. 27 G. 3. c. 44.* that “ no suit for defamatory words shall be
“ commenced in any of the ecclesiastical courts, unless the same
“ shall be commenced within six calendar months from the time
“ when such defamatory words shall have been uttered.” And by § 2. “ no suit shall be commenced in any ecclesiastical court for
“ fornication, or incontinence, or for striking or brawling in any
“ church or church-yard, after the expiration of eight calendar
“ months from the time when such offence shall have been com-
“ mitted.”]

(E) Of the Exceptions in the Statute 21 *Jac. 1.*
c. 16. and what will save a Bar thereof: And
herein,

1. What Actions are within the Exceptions of the Statutes.

AS to this it hath been adjudged, that the last proviso in the
statute not only extends to those actions therein enumerated,
but also to an *assumpsit*, though not mentioned, and to all other
actions on the case, being of equal mischief, and plainly within
the intention of the legislature.

escape is out of the statute; *Saund. 37.* but an action on the case for an escape is not. *Sid 305. So*
is debt for not setting out of tithes; for these are not grounded upon any contract. *Cro. Car. 515.*
Hutt. 109.

Cro. Car.
245. 333.
2 Saund.
120.
2 Mod. 71.
Sid. 453.
Debt upon

2. Of the Exception in relation to Infants, &c.

As to this it hath been holden, that the statute being general, *Lev. 31.*
infants had been included, had they not been particularly ex-
cepted.

It hath been holden, that if an infant, during his infancy, by
his guardian brings an action, the defendant cannot plead the sta-
tute of limitations; although the cause of action accrued six years
before, and the words of the statute are, *That after his coming of*
age, &c.

2 Saund.
121.

It hath been held in Chancery, that if one receives the profits
of an infant’s estate, and six years after his coming of age he
brings a bill for an account, the statute of limitations is as much
a bar to such a suit, as if he had brought an action of account at
common law; for this receipt of the profits of an infant’s estate
is not such a trust as, being a creature of the court of equity,
the statute shall be no bar to; for he might have had his action
of account against the defendant at law, and therefore no necessity
to come into this court for the account; for the reason why bills
for an account are brought here, is from the nature of the de-
mand,

Abr. Eq.
304.
Lockey v.
Lockey.

mand, and that the party may have a discovery of books, papers, and the party's oath, for the more easy taking of the account, which cannot be so well done at law. But if the infant lies by for six years after he comes of age, as he is barred of his action of account at law, so shall he be of his remedy in this court.

3. Of the Exception in relation to Merchants' Accounts.

Jon. 401.
2 Sand. 124.
125.
Lev. 287.
2 Keb. 622.
Lev. 298.
Vent. 90.
Mod. 70.
270.
2 Mod. 312.
2 Vern. 456.

As to the exception relating to merchants, it hath been a matter of much controversy, whether it extends to all actions and accounts relating to merchants and merchandize, or to actions of account open and current only, the words of the statute being, *That all actions of trespass, &c. all actions of account and upon the case, other than such accounts as concern the trade of merchants; so that by the words, other than such actions, not being said actions of account, it has been insisted that all actions concerning merchants are excepted.*

Vide the authorities supra.

But it is now settled, that accounts open and current only are within the statute; and that therefore, if an account be stated and settled between merchant and merchant, and a sum certain agreed to be due to one of them, if in such case, he to whom the money is due, does not bring his action within the time limited, he is barred by the statute.

Carth. 226.

So, it hath been adjudged, that by the exception in the statute concerning merchants' accounts, no other actions are excepted but actions of account.

Carth. 226.

Also it hath been adjudged, that bills of exchange for value received, are not such matters of account as are intended by the exception in the statute of limitations.

Catling v. Skoulding, 6 Term Rep. 189.

[But, though the exception in the statute is so far limited to transactions merely between merchant and merchant, that where there is no item of account at all within six years before the action brought, the plaintiff will be precluded, unless he can shew that the accounts were between merchant and merchant, &c.; yet a mutual account of any sort between a plaintiff and defendant, though neither of them of the description of merchant, for any item of which credit has been given within six years, is evidence of a promise to pay the balance, and will take the case out of the statute of limitations. But where all the items of an open, unliquidated account are on one side, the last item which happens to be within six years shall not draw after it those that are of longer standing.]

Cotes v. Harris, Bull. N. P. 149.

4. Of the Exception in relation to Persons beyond Sea.

Cro. Car. 245. 333.
Jon. 252.
Lev. 143.
3 Mod. 311.
2 Lutw. 950.
2 Salk. 420.
pl. 1.

It seems to have been agreed, that the exception as to persons being beyond sea, extends only where the creditors or plaintiffs are so absent, and not to debtors or defendants, because the first only are mentioned in the statute; and this construction hath the rather prevailed, because it was reputed the creditor's folly, that

he

he did not file an original, and outlaw the debtor, which would have prevented the bar of the statute.

But as the creditors being beyond sea is saved by the 21 Jac. 1. c. 16. so now by the 4 and 5 Ann. c. 16. it is enacted, "That if any person or persons, against whom there is or shall be any cause or suit of action for seamen's wages, or against whom there shall be any cause of action of trespass, detinue, action *sur trover*, or replevin, for taking away goods or chattels, or of action of account, or upon the case, or of debt grounded upon any lending or contract without specialty, of debt for arrearages of rent, of assault, menace, battery, wounding, and imprisonment, or any of them, be or shall be, at the time of any such cause or suit of action given or accrued, fallen or come, beyond the seas, that then such person or persons, who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions against such person and persons after their return from beyond the seas, within such times as are limited for the bringing of the said actions by the 21 Jac. 1. c. 16."

Show. 98.
Carth. 136.

[This exception is not confined to *Englishmen*, who may occasionally go beyond sea, but is general, and extends to foreigners, who are constantly resident abroad.

Strithorst v.
Græme, 2 BL
Rep. 723.

As the statutes of 21 Jac. and 4 and 5 Ann. are both express, that the party to be excused must be *beyond sea*, of course *Scotland* is not included in the exception.

King v.
Walker,
1 Bl. Rep.
286.

If a plaintiff be in *England* at the time the cause of action accrues, the time of limitation begins to run, so that if he, or, if he die abroad, his personal representative, do not sue within six years, the statute attaches; and this, though the personal representative were abroad at the time of the testator's or intestate's death.

Smith v.
Hill, 1 Will.
134.

The absence of one of several co-plaintiffs will not prevent the statute of limitations from attaching, for it lays the others under no disability of suing.]

Perry v.
Jackson,
4 Term Rep.
516.

5. Where no Executor or Administrator to sue or be sued.

If *A.* receives money belonging to a person who (*a*) afterwards dies intestate, and to whom *B.* takes out administration, and brings an action against *A.*, to which he pleads the statute of limitations, and the plaintiff replies, and shews that administration was committed to him such a year, which was *infra sex annos*; though six years are expired since the receipt of the money, yet not being so since the administration committed, the action is not barred by the statute.

Salk. 422.
pl. 4.
Curry v.
Stephenson,
Skin. 555.
pl. 3. S. C.
4 Mod. 376.
S. C. Carth.
335. S. C.
in which last
book it is

said, that Holt was of opinion, that the administrator should have six years from the time of granting administration, according to Stanford's case cited in Saffin's case, Cro. Jac. 60, 61. but in the principal case there was judgment against the plaintiff on another point. [(a) Note; This statement of the facts of the case of Curry v. Stephenson is incorrect. It appears from Skinner's Report, that the money was not received by *A.* until after the death of the intestate: so that, before administration was granted, there was no person who could claim it; and the statute begins to operate only from the time a right to demand the thing in question vests in some one. In Stanford's case the fine was not levied till after the death of the intestate. Had the money been received in the lifetime of the person who died intestate, that person would have had a right of action against *A.* vested in him, and from that period the time of limitation would have commenced; and the statute would have been a bar. For, when once the time of limitation has begun to run, it suffers no interruption from the death of the claimant, nor does it revive in favour of any person upon whom the right of claim may devolve.]

2 Salk. 424.
pl. 13. * See
Stra. 907.
the next case.

It is said in general, that where one brings an action before the expiration of six years, and dies before judgment, the six years being then expired, this shall not prevent his executor *.

Trin. 5G. 2.
Wilcox and
Huggins.
Barnard.

K. B. 355.
Fitzgib. 170.

2 Stra. 907.

(a) That the statute of limitations was one of the best of statutes, and the pleading thereof no disparagement to any body. *Per*

Holt, C. J. 7 Mod. 12. [It is a noble, beneficial act. *Per* Wilmot, J. 1 Bl. Rep. 287. It is allowed to be pleaded in the courts both of C. P. and K. B. after an order for time to plead on the terms of pleading issuable. *Rucker v. Hannay*, 3 Term Rep. 124. *Vide* *Studholme v. Hodgson*, 2 Term Rep. 390. *contr.*]

Knight v.
Bate, Cowp.
738.

[Where a statute for allotting waste lands within a manor, directed all disputed claims to be tried by a feigned issue, and limited the time of bringing the action to six months; it was holden, that an action brought against a copyholder, within time, if abated by his death, must be revived against the heir within six months after the plaintiff had notice of the descent, though the heir were not admitted till long after that time.]

2 Vern. 695.

If there is no executor against whom the plaintiff may bring his action, he shall not be prejudiced by the statute of limitations, nor shall any laches in such case be imputed to him.

6. Where no Jurisdiction to sue in, or where hindered by some Authority.

Keb. 157.

Lev. 31. 111.

Carth. 137.

2 Salk. 420.

pl. 1. (b) In

Plow. 9. b.

that things

happening

by an invin-

cible neces-

sity, though

they be

against the

common

law, or an act of parliament, shall not be prejudicial.—Therefore to say the courts were shut, is a good

excuse, on voucher of record. Bro. tit. Failure of Record.—So, in the times of domestick war, when the

courts of justice are shut, a descent shall not take away an entry, though the disseisin was in times of peace;

for then the disseisee would be without all remedy, there being no courts open to bring his action in. Co.

Lit. 249. (c) In some books it is said, that the defendant rejoined, and set forth the act of oblivion, and that

for confirmation of judicial proceedings; and for this reason also the replication was held ill. Keb. 157.

Lev. 111.

It seems agreed, that there being no courts, or the courts of justice being shut, is no plea to avoid the bar of the statute of limitations; as, where after the civil war an *assumpsit* was brought, and the defendant pleaded the statute of limitations; to which the plaintiff replied, that a civil war had broke out, and that the government was usurped by certain traitors and rebels, which hindered the course of justice, and by which the courts were (b) shut up, and that within six years after the war ended he commenced his action; this replication was held ill (c); for the statute being general, must work upon all cases which are not exempted by the exception.

3 Lev. 283.

And in confirmation of this doctrine we find, that an act of parliament was made 1 W. & M. whereby it is enacted, that from the

the 10th of *December* (which was the day that King *James* departed, till the 12th of *March* 1688, when King *William* assumed the government) shall not be accounted any part of the time within which any person by virtue of the statute of limitations might bring his action; but that he shall have so much allowance of time as is from the 10th of *December* to the 12th of *March* for bringing his action.

It is clearly agreed, that the defendant's being a member of parliament, and entitled to privilege, will not save a bar of the statute; because the plaintiff might have filed an original without being guilty of any breach of privilege. Lev. 31. 111. Carth. 136, 137.

It is said, that if a man sues in Chancery, and, pending the suit there, the statute of limitation attaches on his demand, and his bill is afterwards dismissed, the matter being properly determinable at common law; in such case, the court will preserve the plaintiff's right, and will not suffer the statute to be pleaded in bar to his demand. Vern. 73, 74. But it seems, that there must be some equitable circumstances attending

ing his case; and therefore in 2 Chan. Ca. 217. it is said, that unless the plaintiff was stayed by some act of the court, as injunction, &c., the court will not interpose.

If the statute of limitations be pleaded to an action, the plaintiff to save his action may reply, that he had commenced (a) the suit in an inferior court within the time of limitation, and that it was removed to *Westminster* by *habeas corpus*; and this shall be allowed by a favourable construction of the statute of limitations; although in strictness the suit is commenced in the court above, when it is removed by *habeas corpus*. Sid. 228. 3 Keb. 263. Beven and Chapman. Lev. 143. S. C. but same point does not appear. (a) The

plaintiff must aver, that the cause of action in the court below, and that removed, is the same. Cro. Car. 294. But a difference in value is not material. Vent. 252.

So, in a like case, where debt was brought in the Palace-court, and after some proceedings there, the six years expired, the defendant sued a *habeas corpus*, and removed the cause into *B. R.*, where the plaintiff declared *de novo*; and the defendant pleaded, that the cause of action did not accrue within six years before the *teste* of the *habeas corpus*; this was held to be a good plea; but that the plaintiff might reply the suit below, and shew that to have been within the six years; not that this suit was a continuance of the suit below, but that the plaintiff had rightfully and legally pursued his right; and it should not be in the power of the defendant to defeat or hinder him of a remedy without any default *. 2 Salk. 424. pl. 13. Mathevs v. Phillips. * So, of a plaintiff in the Sheriff of London's court. Stra. 719. Ld. Raym. 1427.

7. Where the Suing out a Writ will save the Bar of the Statute.

It is clearly agreed, that the suing out an original will save a bar of the statute of limitations, and that thereupon the defendant may be outlawed; and that if beyond sea at the time of the outlawry, though it shall be reversed after his return, yet the plaintiff may bring another original by (b) *journeys accounts*, and thereby take advantage of his first writ. Carth. 136. Salk. 420. pl. 1. 3 Mod. 311. (b) For this vide Lutw. 260.

Sid. 53. 60. Also, it is agreed, that the suing out a *latitat* is a sufficient commencement of a suit, to save the limitation of time, because Salk. 421. the *latitat* is the original of *B. R.* and may be continued on record 1 Str. 550. as an original writ. 2 Str. 734. Ld. Raym. 1441. 2 Burr. 961.

2 Keb. 46. Also, it hath been ruled, that to a plea of the statute of limitations the plaintiff may reply, that he sued out a *latitat*, and continued it down by a *vicecomes non misit breve*, without concluding *prout patet per recordum*; for the *latitat* roll is only for the private use of the court, and no record. Bottle and Wood.

Style, 178. So, it seems, the plaintiff may reply, that he sued out a *latitat* of 2 Keb. 369. such a term, without setting forth the day of the *teste*; and that S. C. cited. in such case it shall have relation to the first day of the term. [But in this case, the defendant may in his rejoinder shew the true day on which the *latitat* was sued out, in opposition to the *teste*. Johnson v. Smith, 2 Burr. 950.]

Carth. 144. But though the suing out of an original, or *latitat*, will be a sufficient commencement of a suit, yet the plaintiff, in order to 2 Salk. 420. make it effectual, must shew that he hath (a) continued the writ pl. 2. to the time of the action brought. Lutw. 101. 254.

3 Mod. 33. (a) That the attorney's writing the continuances on the writ in his chambers, is sufficient. Sid. 53. Keb. 140. [The continuances, it seems, may be entered at any time. Bates qui tam v. Jenkinson, E. 24 G. 3. cited in 6 Term Rep. 618.]

Carth. 144. As, in *assumpsit* for fees due to an attorney, the defendant pleaded, Rudd v. *non assumpsit infra sex annos*; the plaintiff replied, that on such Berkenhead. a day two years before he had sued out an attachment of privilege 2 Salk. 420. against the defendant; upon which writ *taliter processum fuit*, that pl. 2 S. C. the defendant (on such a day) in *Hilary* term anno 2 Will. &c. appeared, and the plaintiff declared against him *modo & forma*, &c. And upon demurrer to this replication it was held ill; because the plaintiff did not set forth any continuance of this writ of attachment, (*per vic. non misit breve*,) which was sued out two years before; for it is impossible that the defendant should appear in *Hilary* term anno 2 Will. to a writ returnable two years before, and no other writ is set forth by the plaintiff; but if the plaintiff, after the *taliter processum fuit*, had shewn the last attachment, and the return thereof, upon which, in truth, the defendant did appear, it had been well enough without shewing any of the continuances.

Salk. 421. An *indebitatus assumpsit* was laid several ways; the defendant Green v. pleaded, *actio non, quia dicit quod billa prædictæ exhibit. fuit 20 die Junii, Rivett. & non antea & quod ipse ad aliquod tempus infra sex annos ante exhibitionem billæ prædictæ. non assumpsit*, &c. The plaintiff replied a bill of *Middlesex* tested die *Lunæ prox. post tres septimanas*, &c. returnable the same day; whereupon was returned *non est inventus*, and continued down by *vic. non misit breve & præcept. sicut alias*. To this it was demurred, and judgment given for defendant; for there cannot be such a bill of *Middlesex* as this, which is returnable the very day of the *teste*; and the statute of limitations, on which the security of all men depends, is to be favoured.

[An attachment of privilege is not a continuance of a bill of *Smith v. Middlesex.* Bower, 3 Term Rep. 662. Leadbeater v. Markland, 2 Bl. Rep. 1131.

Although a suit actually commenced, though informally or irregularly, will have the effect of preventing the operation of the statute; yet the plaintiff must shew that the first writ was (a) returned; for until the return of the writ the court is not in possession of the cause. (a) *Harris v. Woolford*, 6 Term Rep. 617. Bull. N. P. 151.

A bill may be filed against an attorney in the vacation, in order to prevent the statute from attaching.] *Lane v. Wheat*, B. R. M. 23 Geo. 3. Dougl. 313. n.

8. Where a Debt barred by the Statute shall be said to be revived.

It is clearly agreed, that if after the six years the debtor acknowledges the debt, and promises payment thereof, that this revives it, and brings it out of the statute; as, if a debtor by promissory note, or simple contract, promises within six years of the action brought that he will pay the debt; though this was barred by the statute, yet it is revived by the promise; for as the note itself was at first but an evidence of the debt, so that being barred, the acknowledgment and promise is a new evidence of the debt, and being proved, will maintain an *assumpsit* for recovery of it. *Salk. 28. pl. 16. 29. 19. Carth. 470. 5 Mod. 425, 426. 2 Show. 126. pl. 104. 2 Vent. 151.*

Also, it hath been adjudged, that a conditional promise will revive a debt barred by the statute of limitation; as, where to an *assumpsit* by an executor for goods sold and delivered by the testator, the defendant pleaded the statute; and upon evidence it appeared, that the defendant within six years, being applied to by the executor for the debt, said, *If you prove that I had the goods, I will pay you*; which being fully proved at the trial, it was held that this conditional promise revived the debt; and that though made to the executor, after the death of the testator, it was sufficient to maintain the issue; (b) because the promise did not give any new cause of action, but only revived the old cause, and was of no other use but to prevent the bar by the statute of limitations. *Com. 53. S. C. Carth. 470. Heylin v. Hastings. Salk. 29. pl. 19. S. C. 5 Mod. 425. S. C. cited.* (b) Where the plaintiff declared as executor, on a promise to the testator, and the defendant pleaded *non assumpsit infra sex annos*; and upon the trial of the issue it appeared, that there was a new promise made within six years, but it was a promise made to the plaintiff himself, and not to the testator; it was held *per cur.* that he should have declared accordingly. *Salk. 28. Dean v. Crane, 6 Mod. 309. S. C. [Bull. N. P. 150. S. C.]*

So, it hath been held, that a bare (c) acknowledgment of the debt within six years of the action, is sufficient to revive it, and prevent the statute, though no new promise was made. *Carth. 470.* said to be so held by all the judges in *Serjeants'-Inn.* (c) As, stating an account of the goods sold, March, 105-6.—[And an acknowledgment of the debt even after the commencement of the action will take it out of the statute. *Yea v. Fouraker*, 2 Burr. 1099. What is an acknowledgment is matter for the consideration of a jury. *Lloyd v. Maund*, 2 Term Rep. 760. But although a promise is not necessary to take the demand out of the statute, yet the declaration of the defendant must amount to an acknowledgment of a debt; and therefore, where a person sued by an executor said, "I acknowledge the receipt of the money, but the testatrix gave it me." *Clive, Baron*, held it not sufficient. *Owen v. Wolley*, Bull. N. P. 148.]

2 Vent. 151. But if an *indebitatus assumpsit* for goods sold be brought against Bland v. four persons who plead the statute of limitations, and it be found. Hafelrig, that one of them promised within six years, there can be no adjudged by three judges judgment against him, for the contract being entire, it must be against *Ventris* who inclined to the contrary; because the plea of *non assumpsit infra sex annos* implies a promise at first; and if one should renew his promise within six years, it is reasonable it should bind him; and the plaintiff must sue them all, else he will vary from the original contract. — [But it hath been lately determined, that the acknowledgment of one out of several drawers of a joint and several promissory note, will take it out of the statute as against the others, and may be given in evidence in a separate action against any of the others. *Whitcombe v. Whiting*, Dougl. 652. And if in such case, one of the drawers becomes bankrupt, and the payee receives a dividend under the commission on account of the note, this payment of the dividend under the commission will amount to such an acknowledgment of the debt as will prevent any of the others from availing themselves of the statute of limitations in an action brought against them for the remainder of the money due on the note. *Jackson v. Fairbank*, 2 H. Bl. 340. — The case of *Bland v. Hafelrig* in the text, Mr. Douglas observes, may be explained on the manner of the finding; for, as the plea was *joint*, and the declaration must have alleged a *joint undertaking*, the verdict did not find what the plaintiff had bound himself to prove. But, according to the principle in *Whitcombe v. Whiting*, the jury were to consider the promise of one as the promise of all, and therefore, to find a general verdict against all. Dougl. 653. n.]

Salk. 154. It seems to be the doctrine of the courts of equity, that if a man by will or deed subject his lands to the payment of his debts, Pl. 3. debts barred by the statute of limitations shall be paid, for they 2 Vern. 141. [See, as to this point, are debts in equity, and the duty remains; and the statute hath Blakeway v. not extinguished that, though it hath taken away the remedy. Earl of

Strafford, 2 P. Wms. 373. *Andrews v. Brown*, Pr. Ch. 385. *Jones v. Earl of Strafford*, 3 P. Wms. 77. *Vaughan v. Guy*, Mos. 245. *Legattick v. Cowne*, *Id.* 391. *Lacon v. Briggs*, 3 Atk. 107. *Truman v. Fenton*, Cowp. 548. *Oughterlony v. Earl of Powis*, Amb. 231.]

Abr. Eq. Also it hath been ruled in equity, that if a man has a debt due 305. to him by note, or a book-debt, and has made no demand of it Andrews v. for six years, so that he is barred by the statute of limitations; Brown. yet if the debtor, or his executor, after the six years, put out an advertisement in the *Gazette*, or any other newspaper, that all persons who have any debts owing to them, may apply to such a place, and that they shall be paid; this (though general, and therefore might be intended of legal subsisting debts only) yet amounts to such an acknowledgment of that debt which was barred, as will revive the right, and bring it out of the statute again.

(F) Of the Manner of pleading, and taking Advantage of the Statute of Limitations.

Lev. 111. IT seems to be admitted, that the statute of limitations must be Sid. 253. pleaded (a) positively by him that would take (b) advantage thereof; (c) and that the same cannot be given in evidence, & vide Cro. Jac. 115. especially in an *assumpsit*, because the statute speaks of a time (a) And therefore if the defendant pleads, that if any such promise was made, it was not within six years, and so within the statute of limitations; such conditional plea is not good; vide head of Pleadings. — But pursuant to the statute 4 & 5 Annæ, c. 16. for amendment of the law, the defendant, by way of double plea, may plead *non assumpsit*, and *non assumpsit infra sex annos*; though it may seem inconsistent, the plea of *non assumpsit infra sex annos* implying

plying a promise. (b) If a man devises all the rest and residue of his personal estate, after debts and legacies paid, to J. S. and several of the creditors are barred by the statute of limitations, who notwithstanding bring actions against the executor, and he refuses to plead the statute of limitations; yet equity will not in favour of J. S., to whom the surplus is devised, compel the executor to plead the statute. Abr. Eq. 305. *Castleton v. Lord Fanthaw.* (c) That though it appears upon the face of the declaration that the cause of action did not arise within six years, yet the defendant shall not take advantage of that without pleading, because there might be an original sued out, which the plaintiff cannot otherwise shew, than by way of replication, upon the defendant's putting him upon it. 2 Salk. 422, 3.

But in debt for rent, upon *nil debet* pleaded, the statute of limitations may be given in evidence; for the statute has made it no debt at the time of the plea pleaded, the words being in the present tense. Salk. 278. pl. 1. *per Holt.*

In replevin the defendant pleaded not guilty *de capt. prædict.* Sid. 81. *infra sex annos jam ultimo elapsos*; and though it was urged that this was the same with pleading *non cepit*, and if he did not take, he could not be guilty of the detainer; and if this way of pleading were not allowed, the statute would be entirely evaded as to this action; yet the plea was held ill, because he ought to have answered to the detainer, as well as to the taking; for there may be a detainer without a taking: besides, a thing may be lawfully distrained, although unlawfully kept; as, by being put into a castle, &c. by which means it could not be replevied. Arundel and Trevil, Keb. 279. S. C.

In trespass, for a trespass done 13 years before, the defendant pleads, that *infra sex annos, &c. non est inde culpabilis*. Plaintiff replies, that he brought his action such a term, and that within six years before that time the defendant did the trespass; and upon this the defendant takes issue, and is found guilty; and it was held, 1st, That the defendant's plea was good in bar, without pleading the statute. 2^{dly}, That the plaintiff's replication was no departure; although it was objected, that he could have replied nothing, but that he was under some of the disabilities, for which there is a saving in the statute; for the plaintiff is not tied to the time or place laid in the declaration, but may vary from it upon evidence; and so when the defendant, by his plea, pleads to a certain time or place, and thereby makes the time or place material, the plaintiff may follow him without any (a) departure. Raym. 86. Lev. 110. Keb. 566. S. C. *Lee v. Raynes.* (a) Note; This case seems to differ from Tyler and Wall, Cro. Car. 229. for there the plaintiff in his replication varies as well from the time laid by the de-

fendant in his plea, as the time laid in the declaration.

[In equity, where a particular special promise is charged to avoid the operation of the statute, the plaintiff must deny the promise charged, by averment in the plea, as well as by answer to support the plea.] Anon. 3 Atk. 70.

Maihem.

(A) What it is.

(B) How punished.

(A) What it is.

Co. Lit. 126.
128. 3 Inst.
62. 118.
Hawk. P. C.
c. 44.
3 Bl. Comm.
121.

MAIHEM is defined to be any hurt done to a man's body whereby he is rendered less able in fighting, either to defend himself, or annoy his adversary; such as the cutting off, disabling or weakening a hand or finger, striking out an eye or fore-tooth, or castration, &c., and these are properly said to be maihems, and to come under the notion of felonies; but the cutting off an ear, or nose, are said not to be properly maihems, because they do not weaken a man, but only disfigure him.

(B) How punished.

Braet. 144.
3 Inst. 62.

BY the old common law castration was punished with death, and other maihems with the loss of member for member; but of later days maihem was punishable only by fine and imprisonment.

(a) The occasion of this act was an assault that was made on Sir John Coventry, a member of the House of Commons, by slitting his nose, and thence called Coventry's act.

And by the statute (a) 22 & 23 Car. 2. c. 1. it is enacted, "That if any person shall on purpose, and of malice forethought, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any subject of his majesty, with intention in so doing to maim or disfigure, in any the manners before-mentioned, such his majesty's subject, that then, and in every such case, the person or persons so offending, their counsellors, aiders, and abettors, knowing of and privy to the offence as aforesaid, shall be and are by the said statute declared to be felons, and shall suffer death as in cases of felony without benefit of clergy.

" Provided, that no attainder of such felony shall extend to corrupt the blood, or forfeit the dower of the wife, or the lands, goods, or chattels of the offender."

If

If a man attack another of malice forethought, in order to murder him with a bill, or any other such like instrument, which cannot but endanger the maiming him, and in such attack happen not to kill, but only to maim him, he may be indicted on this statute, together with all those who were his abettors, &c. and it shall be left to the jury on the evidence, whether there was a design to murder by maiming, and, consequently, a malicious intent to maim, as well as to kill; in which case the offence is within the statute, though the primary intention was murder*.

Stat. Tri. vol. 6, f. 211. so ruled in Coke's trial who together with Woodburne were condemned and executed at Suffolk assizes,

8 Geo. 1. for slitting the nose of Mr. Crispe.

• REMEDY by Action.—For a threat, assault, battery, or maihem, the party shall have a remedy by action of trespass, *quare manus imposita ita quod*, &c. Lut. 1428.—*Quare in ipsum insultum fecit & ipsum verberavit*, &c. F. N. B. 86. 1.—And such is the form, though he does not wound him. F. N. B. 86. K.—*Quare in ipsum insultum fecit, verberavit, vulneravit, & imprisonavit*, &c. F. N. B. 86. K.—*Quare, cepit, imprisonavit, & in prisona quousque finem*, &c. fecisset, detinuit. F. N. B. 86. K.

By Indictment.—So, maihem is the greatest offence under felony. Co. Lit. 127. a.—So, for a maihem a man may be indicted, fined, and ransomed. Co. Lit. 127. a. b. 3 Inst. 63.—Though the maihem be done by himself. Co. Lit. 127. b.—Though the person be his vassal, who cannot maintain an action for it against his lord. Co. Lit. 127. a.—So, an indictment lies for an assault, battery, or imprisonment of a subject. Com. Dig. 1 V. 526.

When the Damages shall be increased for a Maihem.—If the declaration mention a maihem, the court, upon view of the mayhem, may increase the damages given by the jury.—1 Roll. 572. l. 10. 15. R. 1 Leo. 139.—Though the particular part in which the maihem was, be not specified. R. Hard. 408. [In Brown v. Seymour, the court seemed to think a declaration, that defendant assaulted and maimed the plaintiff in the left hand particular enough, though they did not allow the circumstances of the case to be such as called for an increase of damages. 1 Wils. 6.] So, in battery, where the manner of the battery is described, the court, upon view, may increase the damages. Per Hale. Hard. 408.—So, the court may increase damages, upon view, and examination of witnesses, where the declaration is general *quod maihemavit*, without making any description of the mayhem, if the judge of assize certify the particulars of the mayhem, or be in court, and affirm, that the particulars, now proved, were given in evidence at the trial. 1 Sid. 108.—But where the declaration does not mention a maihem, nor describe the manner of the battery, the court cannot increase the damages upon view. Hard. 408.—So, if the maihem was not the act of the defendant directly, but by an horse, after the plaintiff was thrown down by the defendant. R. 1 Sid. 433.—Or, by a gun, which the defendant let off, and which maimed the plaintiff against his will. R. 1 Sid. 108.—So, if the declaration be general *quod maihemavit*, without describing how, and the judge do not certify it. 1 Sid. 108.—[In Smallpiece v. Bokenham, M. 27 Car. 2. C. B. upon a motion to increase damages *super visum vulneris*, the court said, it was necessary to be proved to be the same wound for which the damages were given, and ordered notice to be given to the defendant who appeared, and witnesses on the one part and on the other were examined, and several of the jurymen, who all said, that no evidence was given to them that any blow was given upon the eye, or that the plaintiff had lost his eye by the battery; and for this reason the court would not increase the damages; for new evidence ought not to be given, this being a censure on the first verdict, and a correction of it. Bull. N. P. 21.]

By Appeal.—So, he may prosecute his appeal of maihem. Han. Ent. 270. Co. Ent. 50. c.—And the writ of appeal, and indictment shall say, *quod felonice maihemavit*. 3 Inst. 63. 118.—To an appeal of maihem, the defendant may plead *not guilty*. Han. 271.—So, if he did it *se defendendo*, he may plead in bar, *son assault demesne*. Han. 271. 277. Co. Ent. 52.—And he must plead it; for he cannot give it in evidence upon *not guilty*. 2 Inst. 316.—So, the defendant may plead a release of the mayhem. Com. Dig. 1 V. 597.—Or, of all actions personal; for the damages only are recovered in such appeal. Lit. f. 502.—So, the defendant may plead 20*l.* or other sum given in satisfaction. Han. 274.—A recovery in trespass for the same maihem. Co. Ent. 50. b.

Maintenance, and the Offence of Buying or Selling a pretended Title.

[See Mr. J. Buller's comment on the doctrine of maintenance, 4 Term Rep. 340.]

MAintenance in general signifies an unlawful taking in hand, or upholding of quarrels, or sides, to the disturbance or hindrance of common right; and is said to be twofold:

Co. Lit. 368.
2 Inst. 213.
2 Roll. Abr.
115.

1. *Ruralis*, or in the country; as where one assists another in his pretensions to certain lands, by taking or holding the possession of them for him by force or subtlety; or, where one stirs up quarrels and suits in the country, in relation to matters wherein he is no way concerned; for this kind of maintenance is punishable at the king's suit by fine and imprisonment, whether the matter in dispute any way depended in plea, or not; but it is said not to be actionable.

2 Inst. 212.
2 Roll. Abr.
115.

2. *Curialis*, or in a court of justice; where one officiously intermeddles in a suit depending in any such court, which no ways belongs to him, by assisting either party with money, or otherwise, in the prosecution or defence of any such suit.

Of this second Kind of Maintenance there are said to be three Species:

1. Where one maintains one side to have part of the thing in suit, which is called champerty.
2. Where one laboureth a jury, which is called embracery.
3. Where one maintains another without any contract to have part of the thing in suit, which generally goes under the common name of maintenance; and of which in the following order.

(A) What shall be said to amount to an Act of Maintenance.

(B) In what Respects some such Acts may be justified: And herein,

1. How far they are justifiable in respect of an Interest in the Thing in Variance.
2. How far in respect of Kindred or Affinity.
3. How far in respect of other Relations; as that of Lord and Tenant, Master and Servant.

4. How

4. How far in respect of Charity.
5. How far in respect of the Profession of the Law.

(C) How Maintenance is restrained, and punished by the Common Law.

(D) How restrained and punished by Statute.

(E) Of the Offence of Buying or Selling a pretended Title.

(A) What shall be said to amount to an Act of Maintenance.

IT is said, that not only he who assists another with money in his cause, as by retaining counsel for him, or otherwise bearing him out in the whole or part of the expence, but also he who, by his friendship or interest, saves him that expence, which otherwise he may be put to, is guilty of maintenance; as where one persuades, or but endeavours to persuade, a man to be of counsel for another *gratis*.

Bro. Maint.
7. 14.
2 Roll. Abr.
118.
Hawk. P.C.
c. 83. § 5.

Also, it seems to be an act of maintenance to open evidence to the jury, or to give evidence officiously without being called upon to do it, or to speak in a cause as one of counsel with the party, or to retain an attorney for him; and some have said, that it is maintenance even barely to go along with him to inquire for a person learned in the law.

Hetl. 78, 79.
Cro. Eliz.
735. Roll.
Abr. 593.
2 Roll. Abr.
118.

It seems to be maintenance for a man of great power and interest to say publicly, that he will spend 20*l.* on one side, or that he will give 20*l.* to labour the jury; and it hath been said to be maintenance for such a person to come to the bar with one of the parties, and stand by him while his cause is tried, without saying any thing: but a promise to maintain another is not maintenance, unless it be in respect of the publick manner in which it is made, or the power of the person by whom it is made.

Hawk. P.C.
c. 83. § 7.
and several
authorities
there cited.

It is said to be maintenance for a juror to solicit a judge to give judgment according to the verdict; but it seems to be no maintenance for a juror to exhort his companions to join with him in such a verdict as he thinks right.

Hawk. P.C.
c. 83. § 8.

It seems to be no maintenance for a man to give another friendly advice what action is proper for him to bring for such a debt; or what method is safest to free him from such an arrest; or what counsellor or attorney is likely to do his business most effectually; for it would be extremely hard to make such neighbourly acts of kindness, which seem rather commendable than blame-worthy, to come under the notion of maintenance; which always seems to

Hawk. P.C.
c. 83. § 9.

imply a contentious and over-busy intermeddling with other men's matters, in which respect it is so highly criminal; yet it is said, that a man of great power, not learned in the law, may be guilty of maintenance, by telling another, who asks his advice, that he has a good title.

Hawk. P.C. c. 83. § 10. It is no maintenance to give a man money, who has no suit then depending, unless it plainly appear that it was given with a design to assist him in a suit intended, which suit is afterwards actually brought.

Hawk. P.C. c. 83. § 11. It is as much an act of maintenance to support a man after judgment given, as to do it pending the plea.

(B) In what Respects some such Acts may be justified: And herein,

1. How far they are justifiable in respect of an Interest in the Thing in Variance.

2 Roll. Abr. 115. 117.
2 Inst. 564.
Bro. Maint. 28. 53.

IT seems clear, that not only those who have an actual interest in the thing in variance, as those who have a reversion expectant on an estate-tail, or on a lease for life, or years, &c., but also those who have a bare contingency of an interest in the lands in question, which possibly may never come *in esse*, and even those who, by the act of God, have the immediate possibility of such an interest, as heirs apparent, or the husbands of such heirs, though it be in the power of others to bar them, may lawfully maintain another in an action concerning such lands; and if a plaintiff, in an action of trespass, alien the lands, the alienee may produce evidence to prove that the inheritance, at the time of the action, was in the plaintiff, because the title is now become his own.

Bro. Maint. 51.

Also, he who is bound to warrant lands may lawfully maintain the tenant in the defence of his title, because he is bound to render other lands to the value of those that shall be evicted.

Noy, 99.
100.
Moor, 620.
Cro. Eliz. 552.
Sid. 217.

Also, he who has an equitable interest in lands or goods, or even in a chose in action, as, a *cestui que trust*, or a vendee of lands, &c., or an assignee of a bond for a good consideration, may lawfully maintain a suit concerning the thing in which he has such an equity; and from the same ground it seems plainly to follow, that the grantee of a reversion for good consideration might, without any attornment, maintain the tenant of the land, before the statute 4 & 5 Anne, c. 16. which makes such attornment needless.

Hawk. P.C. c. 83. § 12.

Wherever any persons claim a common interest in the same thing, as, in a way, church-yard, or common, &c. by the same title, they may maintain one another in a suit concerning such thing; and a man's bail may take care to have his appearance recorded; but, as some say, they cannot safely intermeddle farther.

2. How far in respect of Kindred or Affinity.

Whoever is of kin, or godfather, to either of the parties, or related by any kind of affinity still continuing, may lawfully stand by at the bar and counsel him, and pray another to be of counsel for him; but cannot lawfully lay out his money in the cause, unless he be either father, or son, or heir apparent to the party, or husband of such an heiress.

2 Inst. 564.
Hawk. P. C.
c. 83. § 26.

3. How far in respect of other Relations; as that of Lord and Tenant, Master and Servant.

Not only the actual lord, but also the *cestui que use* of a feignory, may come with the tenant to a trial in an assise against him, and stand by him, and assist him, and also pray the sheriff to return an indifferent jury; and it seems a plausible opinion, that he may also justify laying out his money in defence of his tenant's title: also, the lord of a town may maintain the inhabitants in an action, wherein the right to their common burying-place is questioned, by shewing authentick evidence of it to the jury.

Co. Lit. 65.
101. 384.
2 Roll. Abr.
116, 117.

A tenant may lawfully come with his lord, and stand with him at a trial.

Hawk. P. C.
c. 83. § 22.

A master may go along with his servant, or with his domestick chaplain, to retain counsel: also, he may pray one to be of counsel for him, and may go with him, and stand with him, and aid him at the trial, but ought not to speak in court in favour of his cause: also, if the servant be arrested, the master may assist him with money to keep him from prison, that he may have the benefit of his service; but the master cannot safely lay out money for the servant in a real action, unless he have some of his wages in his hands; but those, with the servant's consent, he may safely disburse.

Bro. Maint.
44. 52.
Hetley, 79.
Moor, 314.

A person retained generally as a servant, and not for a particular occasion only, may lawfully ride about to speed his master's business, and may go to counsel for him, and shew his evidence to the counsel, or to the jury, and stand by him at a trial, but cannot lawfully lay out his own money in the suit.

Hawk. P. C.
c. 83. § 24.

4. How far in respect of Charity.

Any one may lawfully give money to a poor man to enable him to carry on his suit: also, any one may lawfully go with a foreigner, who cannot speak *English*, to a counsellor, and inform him of his case.

Bro. Maint.
14.

5. How far in respect to the Profession of the Law.

A counsellor, having received his fee, may lawfully set forth his client's cause to the best advantage; but can no more justify giving

2 Inst. 564.
2 Roll. Abr.
116.

giving him money to maintain his suit, or threaten a juror, than any other person.

Also, an attorney specially retained may lawfully prosecute or defend an action in the court wherein he is an allowed attorney, and lay out his own money in the suit, and maintain an action against his client for the money so laid out, by virtue of the retainer, without any special promise: also, an attorney so retained may in like manner maintain his client in a court wherein he is not an allowed attorney; but as some say cannot have an action for the money laid out in the suit, without a special promise: but an attorney, who maintains another, is no way justified, by a general retainer, to prosecute for him in all causes; neither can an attorney lawfully carry on a cause for another at his own expence, with a promise never to expect a re-payment; and it is questionable whether solicitors, who are no attorneys, can in any case lawfully lay out their own money in another's case.

But counsellors and attorneys, using deceitful practice in maintenance of their clients' causes, are punishable by the common law, as well as by the statute of *Westm.* 1. c. 28. which enacts, "That if any serjeant, pleader, or other, do any manner of deceit or collusion in the king's court, or consent unto it in deceit of the court, or to beguile the court or the party, and thereof be attainted, he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that court for any man; and if he be no pleader, he shall be imprisoned in like manner by the space of a year and a day at the least; and if the trespasses require greater punishment, it shall be at the king's pleasure."

It is an offence within this statute for an attorney to sue out an *habere facias seisinam*, falsely reciting a recovery where there was none, and by colour thereof to put the supposed tenant in the action out of his freehold.

Also, it is an offence within the statute to bring a *præcipe* against a poor man, having nothing in the land, on purpose to oust the true tenant; or to procure an attorney to appear for a man, and confess a judgment without any warrant; or to plead a false plea, known to be utterly groundless, and invented merely to delay justice, and to abuse the court*.

(C) How Maintenance is restrained and punished by the Common Law.

BY the common law, all unlawful maintainers are not only liable to render damages in an action at the suit of the party grieved, but may also be indicted and fined, and imprisoned, &c. and it seems that a court of record may commit a man for an act of maintenance in the face of the court.

(D) How restrained and punished by Statute.

BY the 1 E. 3. c. 14. and 20 E. 3. c. 4. it is enacted, "That
" none of the king's ministers, nor no great man of the realm,
" by himself nor by other, by sending of letters nor otherwise, nor
" none other great nor small, shall take upon them to maintain
" quarrels, nor parts, in the country, to the disturbance of com-
" mon right."

And by the 1 R. 2. c. 4. it is enacted, "That no person what-
" soever shall take or sustain any quarrel by maintenance in the
" country or elsewhere, on grievous pain, that is to say, the
" king's counsellors and great officers, on a pain that shall be or-
" dained by the king himself, by the advice of the lords of this
" realm, and other officers of the king, on pain to lose their of-
" fices and to be imprisoned, and ransomed, &c. and all other
" persons, on pain of imprisonment and ransom," &c.

In the construction of these statutes the following points have
been holden :

That *nul tiel record* is a good plea to an action on these statutes, Hawk. P.C. c. 83. § 40, 41.
by which it appears that they extend not to taking out an original,
which is never returned, but they extend as well to maintenance
in a court-baron, as to maintenance in a court of record ; neither
is it material whether the plaintiff in the action, wherein there
was such maintenance, were nonsuited or recovered : But it is
said, that none of the statutes of maintenance extend to the spi-
ritual court.

He who fears that another will maintain his adversary, may, Hawk. P.C. c. 83. § 42.
by way of prevention, have an original grounded on these sta-
tutes, prohibiting him to do it.

By the 32 H. 8. c. 9. " No person shall unlawfully maintain or
" cause or procure any unlawful maintenance in any suit, in any
" of the king's courts, where any person shall have authority by
" the king's commission, patent, or writ to hold plea of lands,
" or to examine, hear, or determine any title of lands, &c. and
" no person shall unlawfully maintain, for maintenance of any
" suit or plea, any person or persons, or embrace any freeholders
" or jurors, or suborn any witnesses by letters, rewards, or pro-
" mises, or any other sinister means, to maintain any matter or
" cause, or to the disturbance of justices, &c. on pain of 10*l*.
" one moiety to the king, the other to the informer."

In an information thereon, it is not sufficient to say, that the Hawk. P.C. c. 83. § 45
defendant maintained the party, without adding, that he did it
unlawfully ; neither is it sufficient to say, that a bill was exhibited,
without further shewing that a plea was depending *.
* *Vide* also the statutes
3 Ed. 1.
c. 25, 28.

and 33. 13 Ed. 1. c. 36. and c. 49. 28 Ed. 1. c. 11. 4 Ed. 3. c. 11. 20 Ed. 3. c. 5. 1 R. 2.
c. 7. 13 R. 2. stat. 3. 20 R. 2. c. 1. 8 H. 6. c. 9. and 7 R. 2. c. 15. & *infra*.

(E) Of the Offence of Buying or Selling a pretended Title.

Moor, 751.
pl. 1031.
Hob. 115.
Plow. 80.

IT seems an high offence at common law, as plainly tending to oppression, for a man to buy, at an under rate, a doubtful title known to be disputed, to the intent that the buyer may carry on the suit, which the feller doth not think it worth his while to do; and it seems not to be material whether the title be good or bad; or whether the feller were in possession or not, unless the possession were lawful and uncontested.

Also by the 1 R. 2. c. 9. reciting, that many persons having true title to lands, &c. were wrongfully delayed, by means that the defendants did make gifts and feoffments of their lands in debate, and of their goods to great men, against whom the said pursuants durst not make their pursuits; and also that many persons used to disseise others, and anon to make feoffments sometimes to great men to have maintenance, and sometimes to persons unknown, to the intent to delay the said disseisees, &c. therefore it is enacted, "That no gift or feoffment of tenements or goods be made by such fraud or maintenance, and that if any be so made, they shall be holden for (a) none; and that the said disseisees shall recover against the first disseisor their lands and damages, without having regard to such alienations, so that they commence their suit within a year after the disseisin."

(a) In respect of the disseisees; but they are effectual between the feoffor and feoffee. Co. Lit. 369.

(b) Whether freehold or copyhold. 4 Co. 26. a. Co. Lit. 369. b. Moor, 655. (c) And therefore the plaintiff in his action must shew the value at the time of the bargain. Cro. Car. 233.

It is further enacted by 32 H. 8. c. 9. "That no person shall bargain, buy, or sell, or by any means obtain any pretended rights or titles, or take, promise, grant, or covenant to have any right or title to any (b) hereditaments, unless the feller, &c. his ancestors, or they from whom he claims, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof, for one whole year next before the said bargain and sale, &c. on pain that such seller shall forfeit the whole (c) value of the hereditaments so sold; and the buyer or taker, knowing the same, shall forfeit the value of the hereditaments so by him bought or taken; the one half of the said forfeitures to be to the king, and the other to him who will sue."

But it is provided, "That it shall be lawful for any person, being in lawful possession, by taking of the yearly farm-rents, or profits of any hereditaments, to buy or get, by any reasonable means, the pretended right or title of any other person to the same.

"Provided, that no one shall be charged with these penalties, unless he be sued within one year after the offence."

In the construction of this statute the following opinions have been holden:

That

That the statute being publick, there is no need to recite it in an action brought upon it; but if you take upon you to recite it, a material misrecital will be fatal.

Lit. Rep. 369.
Plow. 84.
Cro. Car. 233. Dyer, 74.

In an action against the buyer of a pretended title, it must expressly appear that the defendant knew that the feller had not been a year in possession; but in such an action by the buyer, the contrary must expressly appear; for otherwise it may be intended that he was *particeps criminis*.

Leon. 167.
Lit. Rep. 369.

It is not sufficient to shew that the feller had not been in possession a year before, &c. without averring, that he had a pretended right or title, for that is the point of the action.

Dyer, 74.
pl. 19, 20.
Plow. 80.
87. Cro.
Car. 233.

A contract for a lease for years, unless fairly made to try a title in ejectment, is within the statute, whether it were made off the land, or upon the land, by a person in or out of possession; and in an action on the statute for making such a lease, there is no need to shew its commencement or end, because the plaintiff is supposed to be a stranger to it.

Co. Lit. 369.
Leon. 166.
And. 76.

No conveyance by one who has the uncontested possession and absolute undisputed propriety of lands, as by a disseisor having obtained a release from the disseisee who had the true right not contested by any other person whatsoever, or by a mortgagor having redeemed his lands, is within the meaning of the statute; because it no way favours of maintenance, and can be prejudicial to no one: neither is a lease for the usual rent, by one who recovers lands by virtue of an ancient title, within the meaning of the statute, though he had the absolute property and possession of the land; for the intent of the statute was to restrain all persons from transferring any disputed right to strangers.

Plow. 88.
Co. Lit. 369.
Leon. 166.
Savil, 95.

Whoever has a reversion or remainder vested in him may lawfully take any conveyance which will strengthen his estate; but cannot take a covenant from a stranger for a conveyance from him, when he shall have recovered the land.

Co. Lit. 369.

Mandamus.

THE writ of *mandamus* is a high prerogative writ, issuing in the king's name, out of the court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of King's Bench has previously determined,

3 Bl. Comm. 110.

determined, or at least supposes, to be consonant to right and justice.

- 3 Burr. 1267.
4 Burr. 2188.
Cowp. 378.
1 Term Rep. 404.
3 Burr. 1267.
3 Term Rep. 651.
1 Term Rep. 404.
3 Term Rep. 652.
Bull. N. P. 199.
Ca. temp. Hardw. 99.
4 Burr. 2189.
- The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice, and defect of police. Therefore, it ought to be used upon all occasions where the law has established no specifick remedy, and where in justice and good government there ought to be one. In the more ancient cases, the grounds upon which the court of King's Bench have granted or refused a *mandamus* are not explicitly stated. Within the last century, it has been liberally interposed for the benefit of the subject and the advancement of justice. The value of the matter, or its importance to the publick police, is not scrupulously weighed. If the party making the application has a right, a *legal* right, and no other *specifick legal remedy*, this will not be denied : for his having a remedy in *equity* will not be considered as any ground of refusal. And even though he may have another *legal* specifick remedy, if such remedy be *obsolete*, the *mandamus* will be granted.
- This writ is the proper remedy to enforce obedience to acts of parliament, and to the king's charters, and, in such cases, is demandable *ex debito justitiæ*. But where the right is of a private nature, as in the case of an office, in which the publick are not concerned, such as that of deputy-register, it is discretionary in the court either to grant or refuse it.]

(A) Of the Nature of the Writ : And herein of the Suggestion and Manner of awarding thereof.

(B) Of the Form thereof, and for what Irregularities it may be quashed or superseded.

(C) In what Cases to be granted : And herein,

1. Where it lies to restore or admit a Person to an Office, and what shall be said such a publick Office for which a *Mandamus* will lie.
2. Where the Party's having another Remedy is a sufficient Foundation to deny it ; and therein of granting *Mandamus*es to restore Members of Colleges, &c.
3. What Removal or Turning out of an Officer will entitle him to a *Mandamus*.

(D) Where it lies to inferior Courts, and Magistrates, to oblige them to do that Justice which the Publick Good requires, and the Law enjoins.

(E) Of

- (E) Of the Authority by which it issues : And herein of the discretionary Power in the Court of granting or refusing it.
- (F) To whom to be directed.
- (G) By whom to be returned.
- (H) Of the Manner of enforcing Obedience to the Writ, and compelling a Return.
- (I) What shall be said a good Return.
- (K) Of traversing the Return, and taking Issue thereon.
- (L) Of the Party's Remedy for a false Return.
- (M) Of awarding a peremptory *Mandamus*.

- (A) Of the Nature of the Writ : And herein of the Suggestion and Manner of awarding thereof.

A *Mandamus* is a writ commanding the execution of an act, where otherwise justice would be obstructed, or the king's charter neglected, issuing regularly only in cases relating to the publick and the government; and is therefore termed (a) a prerogative writ.

(a) 4 Mod. 281. March, 101.

And in this (b) sense and use of it, it is said by (c) some to be of modern date, and to owe its original to (d) *Bagg's case*; but (e) others hold it far more ancient, and that there are instances of such a writ in the reigns of *Ed. 1.* and *Ed. 3.* (f), and that it is founded on these words in *Magna Charta*, c. 29. *Nullus liber homo capiatur vel imprisonetur, aut disseisetur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruat; nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terre; nulli vendemus, nulli negabimus aut differemus iustitiam vel rectum.*

(b) There is a writ called a *mandamus*, which lay where the king's tenant, who held of him by knights service, died, his heir within age, and no writ of *diem clausit extremum*,

10 Mod. 53. &c., was sued out within a year and a day after his death; then issued a *mandamus* to the escheator, commanding him to inquire of what lands holden by knights service the tenant died seised, &c. but for this vide F. N. B. 253. B. Dyer, 209. pl. 19. 248. pl. 18. Lamb. 36. (c) Lev. 23. Show. 263. Ca. Law and Eq. 53. 57. (d) 11 Co. 94. Roll. Rep. 173. S. C. (e) Lev. 23. Palm. 51. Dyer, 333. Skin. 293. pl. 3. 310. pl. 4. [(f) Lord Mansfield said, that in a manuscript book of reports which he had seen, the reporter cites (in reporting Dr. Bonham's case,) a *mandamus* in the time of Ed. 3. directed to the University of Oxford, commanding them to restore a man that was *bannitus*. 4 Burr. 2189.]

4 Mod. 52.
Carth. 217.

Pasch.
6 G. 2. in
B. R. The
King v.
Mayor and
Burgesses of
Evesham.
2 Barnard.
K. B. 236.
265.
2 Str. 949.

2 Kel. 243.
pl. 195.
Mich.

4 G. 2. in
in B. R.

* Where it
is to swear,
or, to admit,
the court
will, in case
the right
appear plain,
grant the
writ upon

the first motion: but where it is to restore one who has been removed, they will first grant a rule to shew cause why such a writ should not issue. Bull. N. P. 199. — Where they grant a rule to shew cause, though upon shewing cause it appear doubtful, whether the party have a right or not, yet the court will issue the *mandamus*, in order that the right may be tried upon the return. Rex v. Dr. Bland, T. 1741. Bull. N. P. 200.

(B) Of the Form thereof, and for what Irregularities it may be quashed or superfeded.

2 Salk. 434.
pl. 16. 452.

Pl. 3.
[2] Upon
producing
the rule in
this case, it
appeared to

be fourteen, and not fifteen days, and so is 1 Str. 407. And one of the days is to be taken inclusive, and the other exclusive, so that a writ tested the 14th may be returnable the 28th. *Ibid.*]

6 Mod. 133.

[6] For the
court will
not amend
it after a re-
turn has

been made to it, particularly, if that return has been traversed. Rex v. Mayor, &c. of Stafford, 4 Term Rep. 689. (c) In Rex v. Mayor of York, the court held, that it was too late for a party to object to the writ after he had made a return to it. 5 Term Rep. 74. But in Rex v. College of Physicians, 3 Burr. 2740. the writ was quashed after the return made. And see acc. Rex v. Ward, 2 Str. 893. Rex v. Mayor of Abingdon, 1 Ld. Raym. 559. 2 Salk. 699.]

If a *mandamus* be awarded to restore nine persons to the place and office of common councilmen, this is such an irregularity for which the writ will be quashed; for several persons cannot join in such writ, the motion of one not being the motion of another: besides, their interests are several*, and they might have been removed for several different causes, one for one fault, and one for another; which would make it impracticable for the court to grant a joint restitution to them.

in an action on the case for a false return to a *mandamus* to restore. * A *mandamus* was granted to a jury of a court baron to do an act to perfect the rights of several. Rex v. Ld. Montague, 24 G. 2. [Bull. N. P. 200. S. C. 1 Bl. Rep. 60. So, Rex v. Borough of Midhurst, 1 Wils. 283.]

[A motion was made for a *mandamus* to the mayor, to assemble and do the business of the corporation, and the writ was granted accordingly. In drawing up the writ, the officer made it out for an assembly, and to admit all persons having a right to their freedom, who should appear before them to demand it. It was moved to supersede the writ, because every person's right was distinct, and it would be hard to oblige the mayor to make a return that he had admitted all who had a right. *Et per curiam*, It must be superseded, for we never intended such a complicated *mandamus* as this.]

"was not warranted by the rule." And see Rex v. Wildman, 2 Str. 579. a *mandamus* that ground.

If the writ be directed to a corporation by a wrong name, this is such an irregularity for which it may be quashed; as, if to the mayor, aldermen and commonalty of *Rippon*. where it should have been, mayor, burgesses and commonalty: but in this case, the parties having made a good return, the court refused to grant a new writ; for by the return, if false, they subjected themselves to an action on the case, and therefore a new writ would be only vexations.

So, where, in a *mandamus* to the corporation of *Ipswich*, the direction was to the vill *de Gippo*, instead of *de Gipwico*; it was held, that the direction was wrong, *Gippus* and *Gipwicus* being different names; but that yet they should have returned the special matter accordingly, and relied upon it; but that, after the return, they admitted themselves the corporation to whom the writ was directed: besides, a corporation may have several names.

If a writ appears on the face of it to be *felo de se*, the court, *ex officio*, may quash it; as, where the Bishop of *Ely* procured a *mandamus* to the vice-master for *Trinity College, Cambridge*, to compel him to execute a sentence (a) of deprivation, pronounced by the Bishop, against Doctor *Bentley*, master of the said college, which sentence the vice-master, by the statutes of the college, was obliged to execute; and it appearing on the face of the writ, that the Bishop himself was general visitor, and that therefore it belonged to him to enforce the execution of his own sentence, the court of *B. R.* quashed the writ, being a matter in which they had no right to intermeddle, there being a proper visitor.

sentence, *qu.* whether the court of King's Bench would not grant a *mandamus* to him for that purpose? See And. 176.]

2 Salk. 436.
pl. 19.
Comb. 307.
S. C.
5 Mod. 11.
S. C.
2 Salk. 433.
pl. 13. S.P.
and that several persons cannot join

granted to a

Rex v.
Mayor of
Kingston
upon Hull,
1 Str. 578.
8 Mod. 209.
S. C. but the
reason assigned in
this last report for the
writ's being
superseded,
is, that "it
superseded on

2 Salk. 433.
pl. 12.
Ld. Raym.
563. The
King v.
Mayor, &c.
of Rippon;
vide Carth.
500-1.

2 Salk. 434.
pl. 16.
2 Ld Raym.
1233.
Serjeant
Whitaker.
Cef.

Hil. 9 G. 2.
in B. R.
The King v.
Doctor
Walker.
[Ca. temp.
Hardw. 212.
S. C.
(a) But if
the Bishop
himself
should refuse to
compel the execution of the

(C) In what Cases to be granted : And herein,

1. Where it lies to restore or admit a Person to an Office, and what shall be said such a publick Office for which a *Mandamus* will lie.

Herein we must observe, that the cases in the books on this head are so unsettled and contradictory, that it is hardly possible to fix on any general rule, whereby to determine in what instances the court of *K. B.*, having a superintendency over all inferior courts and magistrates, will grant a *mandamus* or not; for though in general it be laid down as a rule (*a*), that where a man is refused to be admitted, or wrongfully turned out of any office or franchise that concerns the publick, or the administration of justice, he may be admitted, or restored by *mandamus*; yet, it being still matter of controversy, what shall be said a publick office, or such as relates to the administration of justice; and as the court of late has rather extended than contracted this remedy, it will be necessary, for the better apprehending hereof, to insert the cases themselves, in which a *mandamus* has been granted or denied.

(a) 11 Co.
95. Bagg's
case. 2 Sid.
112. same
rule laid
down by
Glyn, C. J.

11 Co. 98.
4 Inst. 71.

It is clearly agreed, that the court of King's Bench, having a superintendency over all inferior courts and magistrates, may by the plenitude of its power correct, not only errors in judicial proceedings, but also extrajudicial errors and misdemeanors, tending to the breach of the peace, oppression of the subject, to the raising of faction, controversy, debate, or any manner of misgovernment; so that no tort or injury, whether publick or private, can be committed, but what may be reformed and punished according to the due course of law.

11 Co. 94.
Bagg's case.
2 Bulst. 122.
Style, 299.
457.
Raym. 12.
431. 437.
Vent. 302.

And on this foundation it has been adjudged, and admitted in variety of cases, that if a mayor, alderman, burgess (*b*), common councilman, freeman, or other person, member of a corporation, having a franchise and freehold therein, be refused to be admitted, or being admitted, be turned out or disfranchised without just cause, he may have his remedy by writ of *mandamus*.

(*b*) It is said, that a custom to elect one to be of the common council, and to remove him *ad libitum*, is good; but where a man is a freeman, or alderman, &c. they cannot remove him from his freedom or place without cause; and a custom to the contrary is void, because the party hath a freehold therein; but that to be of council is a thing collateral to the corporation. Cro. Jac. 450. Warren's case.

2 Mod. 316.

But it must appear what the office is; and therefore a *mandamus* to swear one, who was elected to be one of the eight men of *Aspburn-Court*, was denied; because it was not specially inserted what the nature of the office was, so as the court might be able to determine, whether it were such a place for which a *mandamus* will lie, or not.

Noy, 78.
Style, 457.
(c) Vent. 77.
Sid. 461.
Lev. 291.
Dighton v.

A *mandamus* lies to restore a town-clerk, being an office of a publick nature, and such as relates to the administration of justice. But (*c*) if a corporation have power by their charter to have a town-clerk, who shall continue *durante beneplacito* of the mayor and aldermen;

aldermen ; by this they have an arbitrary power of turning him out at pleasure, and need not, to the return of a *mandamus*, assign any reasonable cause for their conduct herein.

Mayor of Stratford upon Avon. Raym. 128.

S. C. where it is said, that the court advised to repeal the patent because of this inconvenience.

So, a *mandamus* lies for a (a) recorder and (b) clerk of the peace ; for these are officers of a publick nature, and relate to the administration of justice. 153. [4 Burr. 1999.] (b) 4 Mod. 31. Show. 282. (a) Style, 452. Vent. 143. 12 Mod. 13.

It is admitted by all (c) the books which speak of this matter, that a *mandamus* lies to restore a steward of a court-leet ; but (d) some hold, that a *mandamus* does not lie to restore a steward of a court (e) baron, because but a private office, and such as does not concern the administration of justice ; but (f) others hold that it does ; because he is judge of that part of the court which concerns copyholds, and is therefore an officer concerned in the administration of justice. 195. (f) Vent. 153. 2 Lev. 18. S. P. expressly by (c) 2 Sid. 112. Raym. 12. Sid. 40. 2 Lev. 18. Vent. 153. (d) Raym. 12. Sid. 40. Comb. 127. (e) Fitzgib. Hale, C. J.

It hath been adjudged, that a *mandamus* lies to restore one to an attorney's place in an inferior court ; because his is an office concerning the publick justice, and he is compellable to be an attorney for any man ; and has a freehold in his place.

Lev. 75. Sid. 152. Keb. 549. adjudged in Hurst's case, who was re-

stored to an attorney's place of the court of Canterbury ; and in one Collin's case, who was restored to an attorney's place of the liberty of St Martin's le Grand.

So, a *mandamus* was granted to the mayor of Reading, for an attorney of B. R., who was prohibited to practise in an inferior court in Reading.

Vent. 11. Sid. 410. Mod. 23.

It hath been adjudged, that a *mandamus* lies to restore a sexton ; though as to this the court at first doubted ; because he was rather a servant to the parish than an officer, or one that had a freehold in his place ; but upon a certificate shewn from the minister and divers of the parish, that the custom was to choose a sexton, and that he held it for his life, and that he had 2 d. a year of every house within the parish ; they granted a *mandamus* directed to the churchwardens.

Vent. 143. 153. T. Raym. 211. 2 Lev. 18. 2 Keb. Rep 802. Ile's case. 7 Mod. 118.

A *mandamus* lies to restore a churchwarden, being a temporal officer, and an office concerning the publick ; and therefore (g) where to a *mandamus* to swear a churchwarden, chosen according to the custom, the archdeacon returned, that the person presented was a poor dairy-man who had no estate, was *persona minus habilis* & *idonea* for that office ; the court granted a peremptory *mandamus*. Hardw. 130. 3 Burr. 1421. (g) Carth. 393. Salk. 166. pl. 5. The King v. Rees. 12 Mod. 116. Ld. Raym. 138. [Ca. temp.

2 Sid. 112. Vent. 143. 3 Mod. 335. 5 Mod. 325. 8 Mod. 325. Style, 457. Comb. 417.

So, a *mandamus* hath been granted to restore a parish clerk, chosen according to the custom, being a temporal officer.

Style, 457. 2 Sid. 112. Vent. 143.

3 Mod. 335. Comb. 105. [It will equally be granted, though he be appointed by the parson ; for the right to the office is a temporal right ; and the clerk, though appointed by the parson, is a servant to the parishioners. Rex v. Ashton, Say. Rep. 159. And the office is *prima facie* an office for life. Id. 175.]

King v. Doctor Henchman, official of the consistory-court of the Bishop of London. So, a *mandamus* was lately granted, to admit one *Robert Trott* to the office of parish clerk of *Clerkenwell*, being elected by the parish; it being shewn that the official had usually admitted to this office.

2 Sid. 112. So, a *mandamus* lies for a schoolmaster or the usher of a school, Sid. 40. if he be elected for life, although he be not a sworn officer; for Style, 457. this is a temporal and publick office, in which the party hath a Comb. 144. freehold. Stra. 58.

2 Stra. 897. 1023. [2 Barnard. K. B. 365.]

Rex v. Bishop of London, 2 Str. 1192. [So, lecturers, if they have fixed salaries, not depending upon voluntary contributions, it seems, may be admitted or restored to their stations, if wrongfully kept out, by a writ of *mandamus*.]

1 Will. 11. S. C. Rex v. Bishop of London, 1 Term Rep. 331. Rex v. Field, 4 Term Rep. 125.

Rex v. Blower, 2 Burr. 1043. So, this writ lies to restore a curate to a chapel which is a donative, and endowed with lands.

2 Ld. Raym. 1206. So, it lies to the bishop to grant a licence to a curate, if it be refused without just reason.

2 Barnard. K. B. 366. Rex v. Bishop of Carlisle, 2 Burn's E. L. 103.

Rex v. Barker, 3 Burr. 1265. 1 Bl. So, since the act of toleration, it will lie to admit or restore a dissenting minister where there is an endowment.]

Rep. 300. 352. S. C. Rex v. Jotham, 3 Term Rep. 24. Whether the party applying should not shew his compliance with the requisitions of the toleration act?

2 Roll. Rep. 82. Roll. Abr. 535. A *mandamus* lies to admit, restore, or discharge a constable; for he is a publick officer, and one whose office relates to the administration of justice. Salk. 175.

Carth. 169. It hath been adjudged, that no *mandamus* lies to restore a proctor of *Doctors-Commons*, admitting that no appeal lay from the dean of the arches to the archbishop, as visitor; because this is an ecclesiastical office, and a matter properly and only cognizable in that court; and that the temporal courts are not to intermeddle, or inquire into their sentence, or into the proceedings in any matters whereof they have a proper jurisdiction, but are to give credit thereunto; although it was urged, that if a *mandamus* did not lie in this case, the party would be without remedy, for that no assise would lie of this office; and though an action on the case might lie, yet it may be defective; because a jury may not well compute the damages in proportion to the loss of a man's livelihood: besides, it was urged, that a *mandamus* ought to lie in this case, as well as for an attorney of an inferior court, because this is an (a) officer of a more publick concern.

3 Lev. 309. 3 Mod. 333. S. C. by the name of the King v. Overden. 3 Mod. 332. 3 Salk. 230. pl. 4. Holt, 435. pl. 1. (a) A proctor is not an officer, properly speaking; it is only an employment in that court, which acts by different rules from the King's Bench. 3 Mod. 335. *Per cur.*

Carth. 170. 6 Mod. 18. But it hath been since held, that a *mandamus* lies for a registrar in an ecclesiastical court (b), upon an *affidavit* that he hath ecclesiastical jurisdiction.

S. P. *per* Holt; but said to be against his consent. (d) Comb. 133. 3 Salk. 232. pl. 9. Ld. Raym. 337. And. 177.

So,

So, upon a *mandamus* to the commissary of *York*, to admit Mr. *Dryden* a deputy-registrar under Doctor *Sharp*, it was objected, that the writ did not lie for an ecclesiastical officer, because he is under the inquiry and censure of his proper judge; nor for a private officer, because he may have his action on the case for a disturbance, or an assise, in case the place be a freehold; and herein was cited the above case of *Lee*, and the express opinion of my Lord *Holt* therein, that a *mandamus* did not lie for a deputy-registrar. In answer to which were cited the cases of *The King v. Doctor Bettefworth*, to admit Mr. *Foulkes* apparitor general to the archbishop of *Canterbury*; *Hil. 4 G. 1. The King v. The Chapter of Norwich*, to admit Doctor *Sherlock* to a (a) *prebend*; *Hil. 9 G. 1.* to the university of *Cambridge*, to restore Doctor (b) *Bentley* to his degrees of master of arts and doctor of divinity; from the reason of which cases the court held, that this writ lay for a registrar, an officer much less spiritual than a prebendary, or a doctor in divinity: also, this *mandamus* is at the suit of Doctor *Sharp*, and sets forth his title to the office of registrar, *exercendum per se vel sufficient. deputatum suum*; and that the commissary had refused Mr. *Dryden*, whom he appointed his deputy; and that therefore the *mandamus* was well awarded, because he had no other way to get his deputy admitted.

So, where a *mandamus* was prayed to the lord president and council of the *Marches*, to admit *A.* to the exercise of the office of deputy-secretary; it was objected, 1st, That a deputy could not pray a *mandamus*, because his authority was revocable. 2^{dly}, That he being an officer belonging to the court, they are to judge of his sufficiency, and so have power to refuse. As to the first objection, it was adjudged, that the *mandamus* being at the suit of the principal, and setting forth that he had the office of secretary *exercendum per se vel sufficientem deput. suum*, the *mandamus* was well awarded, because he had no other remedy to have this deputy admitted; and as to the second objection, it was adjudged, that if they refused to admit him for insufficiency, they ought to have returned that he was insufficient.

A *mandamus* is said to have been denied to restore a clerk of a dean and chapter; because he hath nothing to do with the publick, his office being only to enter leases granted, &c., and therefore he hath no more to do with the publick than a bailiff of a manor.

It is said, that the court refused to grant a *mandamus* to restore a surgeon to an hospital, because it was not a publick office.

in such a case the court made a rule, to shew cause why the *mandamus* should not be granted.

[A *mandamus* hath been refused to admit a vestry clerk, his office being merely of a private nature, and not being fixed and permanent, but depending entirely on the will of the inhabitants, who may choose a different clerk at each vestry.]

It hath been adjudged, that a *mandamus* lies to restore the treasurer of the New River Company; for though it be a private corporation, yet it was created by the king's letters patent, which

Mich.
4 G. 2. the
King v.
Doctor
Ward.
2 Stra. 893.
Fitzgib. 123.
pl. 8. 194.
pl. 7. Bar-
nard. K. B.
254. 294.
380. 411.
(a) Str. 159.
Andr. 21.
Barnard, K.
B. 40. See
2 Str. 1082.
Andr. 20.
185. S. P.
(b) Fortesc.
Rep. 202.
2 Ld. Raym.
1334.
Andr. 177.
Stra. 557.

Vent. 110.
Lev. 306.
2 Keb. 738.
The King v.
Clapham.

Comb. 133.

Comb. 41.
7 Mod. 118.
S. P. where,

Rex v. In-
habitants of
Croydon,
5 Term Rep.
713.

Lev. 123.
Sid. 169.
Keb. 625.
Middleton's

case. 3 Mod. being on record the judges are obliged to take notice of them,
334. S. C. and see that they are duly executed.
cited; and
said to have been granted *de bene esse*, to bring the matter before the court.

Comb. 145. A *mandamus* was granted to the mayor of *Bristol*, to restore Mr. *Roe* to the office of sword-bearer.

Vent. 143. It is said, that a *mandamus* was denied to one, who pretended
(a) Refused to be (a) master of the lord mayor's water-house, because not an
to restore the clerk of office, but a service.

the Butchers Company. 6 Mod. 18. 2 Ld. Raym. 959. 1004. So, to restore the approver of guns
to the Gunsmiths Company. 6 Mod. 82. 2 Ld. Raym. 989. Comb. 347. — But *qz.* of these cases;
for they seem not to be law.

Case of Scri- [A *mandamus* was granted to the court of aldermen in *London*,
ven and to restore a person to the office of yeoman of the wood-wharf, on
Turner, an affidavit of its being an ancient office, and a freehold.]
2 Str. 832.

Hil. 7 G. 2. A *mandamus* was granted, to restore one *Smith* to the office of
in B. R. clerk of the city-works; it appearing by his *affidavit*, that the
The King v. office was an ancient office, established time out of mind, to survey
City of London. 2 Bar- the works and edifices of the city, and to see that all the city-
nard. K. B. buildings were well done; and to sign the workmen's bills; and
398. S. P. that he was admitted into this office, with the fees belonging to it,
& C. *quamdiu se bene gesserit*; and that there was an oath of office taken
[2 Term by him, and the oaths to the government; for the court held, that
Rep. 182. though there was something here that looked like service, by the
note S. C.] nature of the employment, yet there being an oath of office, and
oaths to the government to be taken, these import a publick
office, for which a *mandamus* is proper.

Rex v. [So, it seems, a *mandamus* will lie to restore to the office of
Mayor of clerk of the Bridge-house estates in *London*, such office being an
London, ancient office for life, the duty of which is to superintend certain
2 Term Rep. estates which are appropriated by the corporation for the support
177. of *London* bridge.]

4 Mod. 281. If there be a dispute between the high-steward of *Westminster*
Comb. 244. and the dean and chapter, about appointing a bailiff, and the
Knipe and steward name one, and the dean and chapter appoint and swear
Edwin. Ld. in another, the appointee of the steward may have a *mandamus*,
Raym. 159. but without prejudice; for though the court will not regularly
163. 338. grant a *mandamus* to try private titles, yet here the appointee of
561. 958. the steward having no feisin, so as to enable him to maintain an
989. 1004. assise, and an action on the case only repairing him in damages,
10 Mod. without putting him in possession of the office, a *mandamus* is a
146. proper remedy.
12 Mod.
609. 666.
Fitzgib.
123. 194.

2. Where the Party's having another Remedy is a sufficient Foundation to deny it; and therein of granting *Mandamuses* to restore Members of Colleges, &c.

(b) Andr. It seems to be now agreed, that no *mandamus* lies to restore
184. or admit a (b) fellow or member of any (c) college, because
Skin. 454. these being private eleemosynary societies, and governed by par-
4 Mod. 112. ticular

ticular laws of the founders, they who would take the benefit of them, must take it on such terms as the founder has thought proper to impose; and must therefore, in case of any grievance, apply themselves by way of appeal to their (d) proper visitors.

(c) That the law is the same in the case of an hospital or college of physick, said to have been adjudged in Merrick's case, who was one of the college of physicians; and in Ayloffe's case. Carth. 92. 3 Mod. 265. [But the law is not in these cases, as here stated, for the court of King's Bench have clearly a jurisdiction over hospitals and colleges of physick. Rex v. Dr. Askew, 4 Burr. 2186. Rex v. Mayor of Gloucester, Mich. 1 W. & M. cited in And. 184.] (d) That in lay-foundations, whether of hospitals or colleges, the visitatorial power is either in the founder or his heirs, or the visitors appointed by the founder, and they have the sole power to execute justice within that foundation; but where the corporation is spiritual, there, the bishop of the diocese is visitor. Carth. 93. 10 Co. 31. Show. 74.

And this seems to have been the better opinion of the judges, not only in those (e) cases where application was made for a *mandamus* before the party had appealed to the visitor, but also where after such application the sentence had been confirmed by the visitor; as in (f) *Appleford's* case, where, to a *mandamus* to restore him to a fellowship of *New College*, the return was, that by the founder's laws they might expel any one who had committed an enormous crime, and that *Appleford* had committed an enormous crime, and therefore they expelled him; that he appealed to the visitor, who was the Bishop of *Winchester*, who confirmed the expulsion, and concluded to the jurisdiction of the court: and this was held a good return, though it did not mention what manner of crime *Appleford* had committed, so that it might appear whether he was lawfully expelled or not; for it was not necessary to mention the crime, because the court had no authority to intermeddle with it.

A *mandamus* to restore one *Prohust* to the place of chaplain of *All Souls College* in *Oxon*, being turned out by the warden of that college, was granted upon suggestion, that the archbishop of *Canterbury* was visitor of the college, and the see was now vacant by the deprivation of the bishop, by virtue of the act of parliament which enjoins the oath of allegiance; and for that *Prohust* had no other remedy, because the dean and chapter of *Canterbury*, who are guardians of the spirituality *sede vacante*, have (g) refused to meddle with this visitatorial power by way of appeal. But at another day, it being shewn in behalf of the college, that the dean and chapter of *Canterbury*, and not the archbishop, are visitors of this college, because they were created, and stand instead of the prior and convent of *Canterbury*, who were visitors heretofore; and farther, that they were ready to hear the appeal; the court discharged the first rule, and ordered *Prohust* to apply himself by way of appeal.

rule for that purpose, to shew cause, was made, 12 Ann. and he seemed to think, that if this power of a visitor be a jurisdiction, yet it is *forum domesticum*, and not any publick jurisdiction; or rather a decision of the founder, upon his own private charity, than any jurisdiction at all. 15 Vin. Abr. 203. pl. 4. [It has been since determined, that a *mandamus* for this purpose will lie to a visitor. Rex v. Bishop of Lincoln, 2 Term Rep. 338. note.]

A *mandamus* was prayed to the mayor and jurats of *Sandwich*, governors of the hospital of the brothers and sisters of *St. Bartholomew*, to restore one who was a sister of the said hospital; and

124. in the case of Philips and Bury fully debated and settled.

(e) As Dr. Witherington's case. Sid. 71. Raym. 31. 68. Lev. 23. Keb. 2. 50. Dr. Robert's case. 2 Keb. 102. Dr. Patrick's case. Raym. 101. Lev. 65. Sid. 346. 2 Keb. 164. 199.

(f) Mod. 82. [So, Rex v. Bishop of Ely, 5 Term Rep. 475.]

Carth. 168. Prohust's case.

Andr. 177.

(g) Whether a *mandamus* will lie to a visitor to compel him to execute his jurisdiction, was said by my Lord Hardwicke in Dr. Bentley's case, Hil. 9 G. 2. not to have been determined, though a

3 Keb. 360. Wheeler's case.

it was urged, that a *mandamus* ought to be granted, because the party had a corody and freehold in the hospital. But *per curiam*: The king is the founder, and so hath the visitation, and therefore application must be made to him.

Rex v.
Bishop of
Chester,
2 Str. 797.

[A *mandamus* was granted, directed to the bishop of *Chester*, as warden of *Manchester* College, to admit a chaplain, upon the ground that the bishop being visitor of this college, which was of royal foundation, and having been also appointed warden, could not visit himself, and, consequently, the visitatorial power was suspended and the remedy was in the court of King's Bench to prevent a failure of justice. But the right of the court of King's Bench to interfere in this case seems to be at least questionable: for where there is a defect of the visitatorial power in private eleemosynary lay-foundations, it hath been since solemnly determined, that the right of visitation devolves upon the king, in his personal, not in his politick capacity, and must be exercised by him in his court of Chancery.

Rex v.
Master and
Fellows of
St. Catherine's
Hall,
4 Term Rep.
233.

(a) Note,
for an obso-
lete remedy
as by assise,
is considered
as an excep-
tion to the
rule. 1 Term
Rep. 404.
3 Term Rep.
652.

(b) Rex v.
Bank of
England,
Doug. 524.

(c) Rex v.
Street,
8 Mod. 98.

(d) Rex v.
Gray's Inn,
Doug. 353.

(e) Rex v.
Mayor of
Colchester,
2 Term Rep.
259.

(f) Rex v.
Erie, 2 Burr.
1197.

(g) Rex v. Bishop of Chester, 1 Term Rep. 396. (b) The case of *Clarke v. Bishop of Sarum*, 2 Str. 1082. And. 20. 185. where such a *mandamus* is granted, is held not to be law in *Powell v. Milbank*, 1 Term Rep. 401. note. The cases of the *King v. Dean and Chapter of Armagh*, *Rex v. Dean and Chapter of Norwich*, 1 Str. 159. and *Rex v. Dean and Chapter of Dublin*, *Id.* 536. are cited in the report in *Andrews*, of *Clarke v. Bishop of Sarum*, in support of the rule. But in the case of the *Dean and Chapter of Norwich*, Dr. Sherlock was prebendary by virtue of an act of parliament, and he had no means but a *mandamus* to get into his stall. In the case of the *Dean and Chapter of Dublin*, there was no determination on the point, but the majority of the judges inclined against the *mandamus*. That the court will not grant a *mandamus* where a *quare impedit* lies, appears also from *Rex v. Marquis of Stafford*, 3 Term Rep. 646.

3 Term Rep.
578.

Hence arises a difference between a *mandamus to admit*, and a *mandamus to restore*. The former is granted merely to enable the party to try his right, without which he would have no legal remedy. But the court have always looked much more strictly to the

the right of the party applying for a *mandamus* to be restored. In these cases, he must shew a *prima facie* title; for if he has been before regularly admitted, he may try his right by bringing an action for money had and received for the profits. Therefore, in order to entitle himself to this extraordinary remedy, he must lay such facts before the court as will warrant them in presuming that the right is in him.]

3. What Removal or Turning out an Officer will entitle him to a *Mandamus*.

It seems by the better opinion, that a member of a corporation, being only suspended, and not (a) totally removed, may have a *mandamus*; because, were it otherwise, they might always suspend, and thereby not only effectually keep him out, but also deprive him of all remedy of redress.

(a) A *mandamus* to restore an alderman expelled from his priority and precedency of his place of alderman.
1 Lev. 119.

Lev. 162.
Keb. 868.
Raym. 152.
The King v.
Approved
Men of
Guildford.

A *mandamus* was granted to the College of Physicians in London, to restore Dr. Goddard to all the privileges and pre-eminences that belonged to him. The president of the college returns, that they were incorporate, &c. by virtue of the statute H. 8., and that they made a by-law, that there should be a select number of twelve to attend in committees, and that Dr. Goddard was one of the thirty, and that they put him out for certain reasons, but that he remains fellow still. And all the court, except Mallet, held that this was a good return, for it was in the fellowship he had a franchise; but to be one of the thirty is no such thing as a man may sue to be restored to, for it is only a select number for the convenience of ordering their affairs.

Sid. 27.
Lev. 19.
Keb. 75. 84.
Dr. Goddard
v. College of
Physicians.

(D) Where it lies to inferior Courts, and Magistrates, to oblige them to do that Justice which the Publick Good requires, and the Laws enjoin.

THE court of King's Bench having a superintendancy over all inferior courts and magistrates, will oblige them to execute that justice which the party is entitled to, and which they are enjoined by law to do; and of this there are multitudes of instances (b); as, where the ordinary refuses to grant the probate of a will to an executor, or to grant administration to the next of kin, he may be compelled thereto by *mandamus*; for these being things enjoined by statute, the temporal courts will take care that due obedience is paid to them.

the prerogative court to grant the probate of a will to a person named executor therein, the ordinary returned, that he was an absconding person, and insolvent; and that he had refused to give caution to pay legacies bequeathed to some of the testator's infant relations; a peremptory *mandamus* was granted; for the ordinary has no authority to interpose and demand caution of the executor, when the testator himself required none. Carth. 457. Saik. 299. pl. 11. The King v. Sir Richard Raines.

Styl. 7, 8.
Lev. 186.
Sid. 293.
Comb. 158.
450. [1 Str.
552. 1 Bl.
Rep. 640.]
(b) And
therefore,
where to a
mandamus to
the judge of

Hil. 4 G. 2. But a *mandamus* will not lie to oblige the ordinary to grant administration *durante minori etate* of an infant to the next of kin, Smith's case in B. R. this being a matter out of the statutes, and therefore discretionary 2 Stra. 892. in the ordinary to whom to grant it; and if in such case he S. C. grants it to an improper person, or insists upon unreasonable security, the redress must be by appeal; or if in the last instance Andr. 24. 366. S. C. there be any remedy at common law, it must be by prohibition. Barnard. K. B. 370. 425. S. C.

Mich. So, if the testator make J. S. his residuary legatee, who by 7 G. 2. in the ecclesiastical law is entitled to administration upon the executor's renunciation; yet, if the spiritual court refuse to admit him B. R. the thereto, they cannot be compelled by *mandamus*; for this is a matter King v. Bettesworth. purely of ecclesiastical cognizance, and out of the statutes; 2 Stra. 956. S. C. and therefore the party's redress must be by appeal. 2 Barnard. K. B. 334. S. C. 2 Kel. 137. pl. 118. S. C.

Rex v. [A *mandamus* issues *ex debito iustitiæ*, to oblige the ordinary and Johnson and his registrar to deliver up an administration bond for the purpose others, East. of enabling the next of kin, or a creditor, to put it in suit.] 29 G. 3. Archbishop of Canterbury v. House, Cowp. 140.

Lev. 91. If by the custom of a corporation, &c. a person serving an apprenticeship there, is at the end of his term entitled to his freedom, Sid. 107. pl. 20. and the mayor, &c. refuse to admit him thereto, they may 12 Mod. 402. be compelled by *mandamus*; for this is an act of publick justice, 12 Mod. which the superior court will see executed. 490. Ld. Raym. 337.

2 Show. Rep. 154. pl. 138. Carth. 448. [1 Burr. 127. And now by 12 Geo. 3. c. 21. "Where any person shall be entitled to be admitted to his freedom; and shall apply to the mayor, or other officer who hath authority to admit freemen, to be admitted a freeman, and shall give notice specifying the nature of his claim to such mayor, or other officer; that such mayor or other officer do not admit such person within one month from the time of such notice, the court of King's Bench will be applied to for a *mandamus* to compel his admission; if such mayor, or other officer shall, after such notice, refuse or neglect to admit such person, a writ of *mandamus* shall issue to compel such mayor, &c. to admit such person, &c."]

Rex v. Tur- [A *mandamus* has been granted to admit a Quaker, having made key Com- his affirmation, into the Turkey Company, without taking the oath pany, 2 Burr 999. prescribed by 26 G. 2. c. 18.]

6 Mod. So, it hath been held, that a *mandamus* lies to the justices of the 218. 310. peace, to oblige them to admit a person to take the oath of allegiance, and to subscribe according to the act of toleration, in Peat's case, & vide order to qualify him to teach a dissenting congregation: And 2 Saik. 572. herein it is said, that the party ought to suggest whatever is necessary to entitle him to be admitted; and if that be not done, or if it be done, and the fact be false, that will be a good matter to return.

Green v. [So, a *mandamus* lies to the registrar of a bishop, or the justices Pope, 1 Ld. at sessions, to register the certificate of a place for the meeting of Raym. 125. protestant dissenters according to the act of toleration. And as Rex v. Justices of Derbyshire, 1 Bl. the registrar and justices, in recording the certificate, are merely ministerial; it does not seem to be necessary for the parties certifying to shew their having complied with the requisitions of the act.] Rep. 606.

So, a *mandamus* lies to the (a) justices of the peace, churchwardens and overseers of the poor, to oblige them to make rates for the relief of the poor.

to make an equal rate, for the remedy is by appeal to the sessions. *Rex v. the Guardians of the Poor in Canterbury*, 1 Bl. Rep. 667. 4 Burr. 2290. *Rex v. Churchwardens of Weobly*, 2 Str. 1259. *Rex v. Churchwardens of Freshford*, Andr. 24. (a) To a justice of the peace to sign a poor-rate. 5 Mod. 275. 6 Mod. 229. Comb. 422. 478. Fol. 36, 37. 368. 2 Sef. Caf. 65. pl. 68. [1 Str. 393. 3 Dougl. on Elect. 142. note. So, to justices of the peace to make a warrant of distress to levy a rate. 1 Wils. 133.]

So, *mandamuses* have been granted to oblige justices of the peace to discharge prisoners, pursuant to acts of parliament made for the relief of insolvent debtors.

judgment in an excise case. *Rex v. Ted*, 1 Str. 530. So, to take security on articles of the peace. *Rex v. Lewis*, 2 Str. 835. 1 Barnard. B. R. 166. S. C. Fitzg. 85. S. C.]

[So, a *mandamus* has been granted to county justices, to receive and proceed upon a general traverse to a presentment by a justice of the peace upon view of a highway being out of repair. So, to appoint overseers. So, it has been granted to compel two justices to receive and proceed on a complaint against an overseer for not paying over the balance of the parish money in his hands, notwithstanding there has been an appeal to the sessions.

Rex v. Justices of Wilts, 3 Burr. 1530. 1 Bl. Rep. 467. S. C. *Rex v. Horton*, 1 Term Rep. 374. *Rex v. Carter*, 4 Term Rep. 246.

So, a *mandamus* has been granted (b) to the keepers of the common seal of the university of *Cambridge*, commanding them to affix it to the appointment of high steward: to the warden of a college (c), to compel him to put the common seal to an answer of the fellows in Chancery, contrary to his own separate answer: to commissioners of the land-tax to elect a clerk (d).]

547. S. C. (c) *Rex v. Wyndham*, Cowp. 377. (d) 1 Term Rep. 146.

So, where by the statutes 19 *Car. 2. c. 3. § 25.* and 22 *Car. 2. c. 11. § 61.* for erecting *Newgate* market, power is given to the mayor and aldermen of *London* to impanel a jury, who shall assess and adjudge what satisfaction and recompence shall be given to the owners of the grounds; and that the verdict of such jury, on that behalf to be taken, and the judgment of the said mayor and court of aldermen thereupon, and the payment of the money so awarded or adjudged, &c. shall be binding and conclusive to and against the owners, &c. and there being 15,000 feet of the grounds of *J. S.* taken away for this purpose, for which a jury being impanelled assessed and awarded two shillings a foot; but the mayor and court of aldermen refused to give sentence or judgment thereupon; a *mandamus* was awarded to compel them to it.

And this general jurisdiction and superintendency of the King's Bench over all inferior courts to restrain them within their bounds, and to compel them to execute their jurisdiction, whether such jurisdiction arises from a modern charter, subsists by custom, or is created by (e) act of parliament, being in *subsidiu justitie*, has of late been exercised in variety of instances; as, (f) a *mandamus*

Comb. 422. 478. [But a *mandamus* does not lie
2 Show. 74. pl. 57. Comb. 203. [So, to give of the peace.

Rex v. Justices of Wilts, 3 Burr. 1530. 1 Bl. Rep. 467. S. C. *Rex v. Horton*, 1 Term Rep. 374. (b) *Rex v. Vice Chancellor, &c. of Cambridge*, 3 Burr. 1647. 1 Bl. Rep. Vent. 187. Raym. 214. Amherst's case.

Andr. 183. (e) A *mandamus* to the president and fellows of St. John's College, Cambridge,

to oblige *damus* granted to the quarter sessions to give judgment for abating them to turn out certain a nuisance.

fellows of the college, whose places became void for not taking the oaths of supremacy and allegiance, pursuant to the statute of 1 W. & M. c. 1. and c. 8. Skin. 359. pl. 1. 368. pl. 15. 393. pl. 30. 546. pl. 9. 4 Mod. 233. S. C. (f) Hil. 3 Geo. 1. Andr. 183. 2 Ld. Raym. 1334. Sef. Caf. 248. So, to receive an appeal. Sef. Caf. 248. [Doug. 191. 3 Term Rep. 504.]

Brooke v. So, a *mandamus* was granted to the court of *Sandwich*, to give judgment in an action of assault and battery.

Mich. 5 Geo. 2. Str. 113. Sef. Caf. 248. Andr. 183. Rex v. Day, Say. Rep. 202. S. P.

Mich. So, a *mandamus* was granted to the sheriff's court in *London*, to give final judgment upon a writ of inquiry.

7 Geo. 1. Baily v. Bourn. Stra. 392. Fortesc. Rep. 198. Sef. Caf. 249. Andr. 183, 184.

Trin. 2 G. So, a *mandamus* was granted to the bailiff of *Andover*, to give judgment in a cause there depending; but the court in this case required an affidavit of their refusal, else it should be presumed that the court would do right.

Mich. So, a *mandamus* was granted to the corporation of *Liverpool*, to hold an assembly for doing the publick business, which was making leases.

8 Geo. 1. Andr. 184. Barnard. K. B. 82. But though these kind of writs are daily awarded to judges of courts to give judgment, or to proceed in the execution of their authority, yet are they never granted to aid a jurisdiction, but only to enforce the execution of it; nor are they ever granted where there is another proper remedy, and therefore will not lie to an officer of an inferior court (a); as, to a serjeant at mace, an apparitor, &c. to compel them to execute their duty; for these are servants to their respective courts, and punishable by the judges of them; and for the superior court to interpose in obliging such inferior officers, would be to usurp the authority of the court, which has a proper jurisdiction over its own officers, and which alone is answerable to the superior court for the execution of such authority; and therefore where a *mandamus* issued to the Vice-Master of *Trinity College Cambridge*, commanding him to execute a sentence of deprivation, pronounced by the Bishop of *Ely*, as visitor of the college, against Dr. *Bentley*, the Master of that College; and it appeared on the face of the writ, and by the return, that the bishop himself or the king were visitors, the court held, that no *mandamus* would lie; for taking the bishop to be general visitor, as the writ supposes, he is the proper person to carry his own sentence into execution, having power *tam in capite quam in membris*; and if the vice-master refuses obedience to his mandate, he may pronounce sentence of deprivation against him, and he will be immediately ousted by the judgment; or, taking the crown to be visitor, the vice-master may be punished by commissioners appointed by the crown; one of which ways the court held to be the proper one to compel the vice-master to do his duty.

A *mandamus*

[(a) Therefore, it will not be granted to compel obedience to an order of sessions. Rex v. Bristow, 6 Term Rep. 168.] Hil. 9 G. 2. in B. R. The King v. Dr. Walker. Ante.

A *mandamus* lies to deliver up the ensigns of an office, or the papers or records of a publick nature to a successor; as, (a) a *mandamus* to deliver the mace, and other ensigns of mayoralty, to the succeeding mayor: so, (b) a *mandamus* to a town clerk, to deliver several books which belonged to the corporation.

314. (b) Comb. 102. 2 Stra. 948. 2 Barnard. K. B. 235. S. P. Rex v. Ingram, 1

Sid. 31.
[Crawford
v. Powell,
3 Burr.
1013. 1 Bl.
Rep. 229.]
(a) 5 Mod.
Bl. Rep. 50.

A *mandamus* lies to oblige corporations to choose proper officers, which if they neglected to do, this by the common law was a forfeiture of their charter; and though by the common law, upon the death of a mayor within his year, which was the act of God, and an ordinary contingency, the court of King's Bench was authorised to grant a *mandamus* immediately to fill up the vacancy; yet, upon an omission to elect at the charter-day, or upon the removal of an officer unduly chosen, there was no power to compel an election before the day came round again to supply those defects.

Vide tit.
Corpora-
tions.

By the 11 G. I. c. 4. it is enacted in the following words:
 "Whereas in many cities, boroughs, and towns corporate, within
 "that part of Great Britain called *England, Wales, and Berwick*
 "upon *Tweed*, the election of the mayor, bailiff or bailiffs, or
 "other chief officer or officers, is by charter, or ancient usage,
 "confined to a particular day or time, without any provision how
 "to act or proceed in case no election be then made; and it fre-
 "quently happens that by such charter, or usage, particular acts
 "are required to be done at certain times, in order to and for
 "the completing of such elections; and by the contrivance or de-
 "fault of the person or persons, who ought to hold the court, or
 "preside in the assembly where such elections are to be made, or
 "such acts to be done, or by accident, it hath sometimes hap-
 "pened, and may frequently do so, if not timely prevented, that
 "no courts or assemblies have been held, or elections made, or
 "such acts done within the time fixed for that purpose; in which
 "cases, if elections of such officers could not afterwards be made,
 "or in consequence of such omission the corporation should be
 "dissolved, great mischiefs might ensue; for remedy and pre-
 "vention whereof be it enacted, That if in any city, borough, or
 "town corporate, within that part of Great Britain called *Eng-*
 "*land, Wales, and Berwick-upon-Tweed*, no election shall be made
 "of the mayor, bailiff or bailiffs, or other chief officer or officers
 "of such city, borough, or town corporate, upon the day, or
 "within the time appointed by charter or usage for such elec-
 "tion; or such election, being made, shall afterwards become
 "void, whether such omission or avoidance shall happen through
 "the default of the officer or officers, who ought to hold the
 "court, or preside where such election is to be made, or by any
 "accident, or other means whatsoever; the corporation shall not
 "thereby be deemed or taken to be dissolved or disabled from
 "electing such officer or officers for the future; but in any case,
 "where no election shall be made as aforesaid, it shall and may
 "be lawful for the members or persons of such city, borough, or
 "corpo-

“ corporation, who have right to vote, or be present at, or to do
 “ any other act necessary to be done, in order to or for the com-
 “ pleting of such election; and they, and such of them, as shall
 “ be hindered by any reasonable impediment or excuse, are hereby
 “ required respectively to meet or assemble together in the town-
 “ hall, or other usual place of meeting, for making such election
 “ within such city, borough, or town corporate, upon the day
 “ next after the expiration of the time within which such elec-
 “ tion ought to have been made, unless such day shall happen to
 “ be *Sunday*, and then upon the *Monday* following, between the
 “ hours of ten in the morning and two of the afternoon of the
 “ same day; and that the members, or persons, having right to
 “ vote at, or to do any other act necessary to be done in order to
 “ such election, or such of them as shall be so assembled or met toge-
 “ ther, shall forthwith proceed to the election of a mayor or bailiff,
 “ or other chief officer or officers, for such city, borough, or corpo-
 “ ration, and to do every act necessary to be done, in order to or
 “ for the completing of such election, in such manner as was
 “ usual in, or in order to the election of such officer or officers,
 “ upon the day, or within the time appointed by charter or usage
 “ for such election; and in case upon such day of meeting here-
 “ by appointed for such election, the mayor, bailiff or bailiffs, or
 “ other proper officer or officers, who ought to have held the
 “ court, or presided at the assembly for such election, or doing
 “ any other act necessary to be done in order to such election, if
 “ the same had been made or done on the day fixed, or within
 “ the time limited by charter or usage for that purpose, shall be
 “ absent; then such other person, having a right to vote, being
 “ the nearest then present in place or office to the person or per-
 “ sons so absenting himself or themselves, shall hold the court,
 “ or preside in the meeting or assembly hereby appointed, and
 “ shall have the same power and authority, in all respects therein,
 “ as belongs to the mayor, bailiff or bailiffs, or other chief officer
 “ or officers of the same city, borough, or town corporate, at any
 “ court or assembly, for the election of officers for such place,
 “ or for doing any other act necessary to be done in order to such
 “ election.”

And by § 2. it is further enacted, “ That if it shall happen that
 “ in any city, borough, or town corporate, within that part of
 “ *Great Britain* called *England*, *Wales*, and *Berwick-upon-Tweed*,
 “ no election shall be made of the mayor, bailiff or bailiffs, or
 “ other chief officer or officers of such city, borough, or town
 “ corporate, upon the day, or within the time appointed by char-
 “ ter or usage for that purpose; and that no election of such
 “ officer or officers shall be made pursuant to the directions
 “ hereinbefore prescribed; or such election, being made, shall
 “ afterwards become void as aforesaid; in every such case it shall
 “ and may be lawful for his Majesty’s court of King’s Bench,
 “ upon motion to be made in the said court, to award a writ or
 “ writs of *mandamus*, requiring the members or persons of such
 “ city, borough, or town corporate, having a right to vote at, or
 “ to

“ to do any other act necessary to be done, in order to such election, to assemble themselves upon a day and at a time to be prefixed in such writ or writs, and to proceed to the election of a mayor, bailiff or bailiffs, or other chief officer or officers, as the case shall require, and to do every act necessary to be done in order to such election, or to signify to the said court good cause to the contrary; and thereupon to cause such proceedings to be had and made, as in other cases of writs of *mandamus* granted by the said court for election of officers of corporations; and of the day and time appointed, in and by any such writ or writs of *mandamus*, for holding such assembly, publick notice in writing shall, by such person as the court shall appoint, be affixed in the market-place, or some other publick place within such city, borough, or town corporate, by the space of six days before the day so appointed; and such officer and other person respectively shall preside in such assembly, as ought to have presided at the election of such mayor, bailiff or bailiffs, or other chief officer or officers, or at the doing any other act necessary to be done in order to such election, in case the same had been made or done upon the day hereinbefore prescribed for that purpose.”

§ 3. “ And whereas in certain boroughs and towns corporate within that part of *Great Britain* called *England*, *Wales*, and *Berwick-upon-Tweed*, the mayor, bailiff or bailiffs, or other chief officer or officers, is or are to be nominated, elected, or sworn at a court-leet, or view of frankpledge, or some other court; and by reason of the contrivance or default of the lord, or his steward, or such other officer, by or before whom such court ought to be held, in not holding the same, or by some accident it hath happened, and may hereafter happen, that no due nomination, election or swearing, of such mayor, bailiff or bailiffs, or other chief officer or officers, hath been, or shall be had or made; be it further enacted by the authority aforesaid, That in every such case it shall and may be lawful to and for his Majesty's court of King's Bench, upon motion to be made in the said court, to award a writ of *mandamus*, requiring the lord, or his steward, or other officer, by or before whom such court ought to be held, to hold, or cause to be holden, such court-leet, or other court, and to do every other act necessary to be done by him, in order to such nomination, election, or swearing, at such day and time as shall be for that purpose judged proper by the said court of King's Bench, and shall be appointed in such writ; or to signify to the said court good cause to the contrary; and thereupon, to cause such proceedings to be had and made, as in other cases of writs of *mandamus*, granted by the said court for holding of any court; and of the day and time appointed, in and by any such writ of *mandamus*, for holding such court, publick notice in writing shall, by such person as the said court of King's Bench shall appoint, be affixed in the market-place, or some other publick place within such borough or town corporate, by the space of six days before the day so appointed; and where a nomination of persons,

" in order to the election of any such mayor, bailiff or bailiffs
 " or other chief officer or officers, is to be made at such court-
 " leet, or other court; in every such case, after such nomination
 " made, all and every other act and acts necessary to be done, in
 " order to such election, shall be had, made, and done at such
 " assembly, and in such manner and form as the same ought to
 " have been had, made, and done, in case such election had been
 " made upon the day next after the expiration of the time pre-
 " scribed for such election by the charter or usage of such bo-
 " rough or corporation, according to the directions hereinbefore
 " mentioned."

§ 9. It is further enacted, " That where any writ of *mandamus*
 " shall issue out of the court of King's Bench in any of the cases
 " aforesaid, the person or persons, to whom such writ shall be direct-
 " ed, shall make his or their return to the first writ of *mandamus*."

Bull. N. P.
 201.

[This being a beneficial law for the subject, the court have been
 very liberal in the construction of it, and therefore have granted
 a *mandamus* for the election of a mayor, though there had not
 been any legal mayor for four years preceding.]

Id. ibid.
 Case of the
 Borough of
 Tintagel,
infra, E.
 2 Str. 1003.
 Case of
 Aberyst-

So, they have granted a *mandamus* where there was a mayor *de*
facto at the time, it appearing clearly there had not been a due
 election. But where it is at all doubtful whether the prior elec-
 tion be legal, the court will not grant such a *mandamus*, till
 the validity of the prior election has been determined in a proper
 manner by information.

with, 2 Str. 1157. Case of the Corporation of Scarborough, *id.* 1180. Rex v. Mayor, &c. of Cam-
 bridge, 4 Burr. 2008. Rex v. Newtham, Say. Rep. 211. But the mayor *de facto* must be made party
 to the rule to shew cause. Rex v. Bankes, 3 Burr. 1452. 1 Bl. Rep. 445. 452.

Case of the
 Corporation
 of Scarbo-
 rough,
 2 Str. 1180.

So, they have granted it to go to the election not only of the
 head officer, but of other annual officers, who were constituent
 parts of the corporation.

See Rex v. Woodrow, 2 Term Rep. 732.

Rex v.
 Willis,
 Andr. 279.

So, they have granted it, to a steward of a court-leet, to hold a
 court-leet and swear a jury, that they may present a person duly
 elected mayor, that is, as duly elected mayor.]

(F) Of the Authority by which it issues: And herein
 of the discretionary Power in the Court of granting
 or refusing it.

Vide tit.
 Courts and
 their Juris-
 diction.

THIS general jurisdiction and superintendency is now only
 exercised by the court of King's Bench, as the supreme court
 for restraining and keeping all inferior courts and magistrates
 within their proper bounds, and obliging them to execute that
 justice with which they are invested.

Vern. 275.

And though a *mandamus* may issue out of Chancery, yet on a
 motion to the Lord Keeper, to grant a mandatory writ to the
 Chief Justice of the King's Bench, to command him to sign a bill
 of exceptions, and a precedent produced, where in a like case
 such a writ had issued out of Chancery to the judge of the Sheriff's
 court in London; the Lord Keeper denied the motion, for that the
 precedent

precedent produced was to an inferior court, and he would not presume but the Chief Justice of *England* would do what should be just in the case.

But though the court of King's Bench be intrusted with this jurisdiction of issuing out *mandamuses*, yet they are not obliged to do so in all cases wherein it may seem proper, but herein may exercise a discretionary power, as well in refusing as granting such writ; as, where the end of it is merely a private right; where the granting it would be attended with manifest hardships and difficulties, &c.

[So, they will not grant it to restore a person, where it is *confessed* he was *rightly* removed, even though he had no notice at the time.]

So, ever since the statute 11 G. 1. c. 4. for obliging corporations to elect officers, it hath been held, that this court hath a discretionary power of refusing a writ for that purpose, but may first receive information about the election, and, if dissatisfied about the right, may send the parties to try it in an information.

Also, in a doubtful case, the court of King's Bench may award a *mandamus* to be considered of further on the return, which may give more light, and discover more fully the justness of granting or refusing it, and on such return may either establish or quash the writ.

Rex v.
Mayor, &c.
of Abridge,
Cowp. 523.
Hil. 8 G. 2.
The King
v. Mayor
and Bur-
gesses of
Tintagel in
Cornwal.
Andr. 280.

Sid. 169.
Lev. 23.
2 Lev. 14.
2 Show. 74.
Carth. 169.
10 Mod. 49.

2 Stra. 1003. 1157.

(F) To whom to be directed.

THE writ is to be directed to him, who by law is obliged to execute it, or to do the thing thereby required; and therefore (a) where a *mandamus* was granted to the mayor, &c. of *Norwich*, it was moved, that the sense of the mayor differed from the majority of the corporation, and that he would execute the writ; whereas the corporation were for returning an excuse, &c. and they prayed, that the mayor might be ordered to deliver the writ to the rest of the corporation; *sed non allocatur*; for he is the head and principal, and (b) take your course against him.

2 Burr. 784. *Id.* 798.] (b) That if the mayor had made any return, contrary to the votes of the majority concerned, it was at his peril; and that the way to punish him was by information in B. R. Carth. 500.

[Where the *mandamus* was directed to the mayor, aldermen, and commonalty of *Rippon*, and they returned that they were incorporated by the name of the mayor, *burgesses*, and commonalty of *Rippon*, the court held the writ bad, because directed to the corporation by a wrong name.

Rex v.
Mayor, &c.
of Rippon,
2 Salk. 433.

The writ must be directed either to that part of the corporation who are to do the act, or to the corporation at large; for if it be directed to a part of the corporation who are not to do the act, it shall be quashed. Therefore, where a *mandamus*, to admit a person to the office of town-clerk, was directed to the mayor and

Rex v.
Mayor, &c.
of Abing-
don, 2 Salk.
699. Reg.
v. Mayor,
&c. of He-

Hereford, Id.
701.

aldermen of Hereford, and in fact, the mayor only was to admit, the writ was quashed.

Rex v.
Mayor, &c.
of Norwich,
1 Str. 55.

So, where the *mandamus* was directed to the mayor, aldermen, and common council of Norwich, to proceed to the election of a town-clerk, the court granted a *superfedeas*, it appearing, that the right of election was in the mayor and aldermen, and the writ was not directed to them, neither was it directed to the corporation by their corporate name.

Pees v.
Mayor, &c.
of Leeds,
1 Str. 640.

But, where the power of motion was in the mayor, aldermen, and others of the common council, the mayor and aldermen being part of the common council, and the writ was directed to the mayor, aldermen, and common council, it was moved to quash it for this direction, because it seemed to infer that the mayor and aldermen were no part of the common council: the court said, here is nobody in this direction who must not join in the act: this is only repeating the several constituent parts of the corporation; and the mentioning the entire common council after the mayor and corporation, is but a repetition *quoad* the mayor and aldermen.]

6 Mod. 133.
The Queen
v. the Town
of Clitheroe.

If a *mandamus* be directed to the two bailiffs of a town, to swear in other bailiffs, and they object, that having sworn in others, and being now no longer bailiffs, and the writ not being directed to them in their natural capacities, they are not obliged to pay any obedience thereto; the court will notwithstanding oblige them to return the writ; for if the persons sworn in by them had no right to be chosen, they still continue bailiffs, and ought to obey the king's writ.

Trin.
5 Geo. 2.
in B. R.
The King
v. Church-
wardens of
Wrexham,
13 Vin.
Abr. 214.
pl. 6.

But where a *mandamus* was directed to the churchwardens of W. to restore A. to the office of sexton, and served upon the late churchwardens, after their office was expired; and a rule was made to shew cause why an attachment should not go, for not obeying the *mandamus*; upon the whole matter being disclosed by affidavit, the court allowed as a good reason for their not returning the writ, that they, at the time of the writ delivered to them, were not churchwardens.

2 Salk. 436.
pl. 18. The
Queen v.
the Mayor,
&c. of
Derby.

A *mandamus* to the mayor, aldermen, and capital burgessees of D., viz. whereas A. and B., &c. removed the party complaining from his office of burgesse, commanding them to command A. and B. to restore him, was quashed, for that it is absurd, that the writ should be directed to one person to command another.

Rex v.
Ward,
2 Str. 893.

[The writ need not set out that the person to whom it is directed, is the person to do the act for which the *mandamus* is granted; for if it is misdirected, it should be so returned.]

(G) By whom to be returned.

Skin. 368.
pl. 15.
Carth. 500.
Comb. 422.
2 Show. 504.
pl. 465.

THE writ is to be returned by him to whom it is directed; and if any other return it in his name, without his privity and consent, an action on the case lies against him: also, it is an offence, for which the court will grant an attachment.

If a *mandamus* be directed to the mayor, &c., and the mayor, who is the most principal and proper person, return and bring in the writ; the court, upon affidavits, will not examine whether there was the sense of the majority, but will receive it, and leave the parties to punish the mayor for the misdemeanor, if he be guilty; but a peremptory *mandamus* will be granted, if the return be falsified. 11. 9. S. C. and leave given by the court to file an information against the mayor.

Carth. 499.
The King
v. Mayor,
&c. of
Abingdon,
1 Ld. Raym.
559. S. C.
2 Salk 431.

(H) Of the Manner of enforcing Obedience to the Writ, and compelling a Return.

ON every *mandamus* there regularly issues an *alias* and *pluries*, to oblige the party to return the writ; but the court of King's Bench may make a peremptory rule to return the first writ; and, in case of disobedience, grant an attachment: also, by the statute 9 Ann. c. 20. and 11 G. 1. c. 4. persons who are by law required to make returns to *mandamuses*, in such cases as are within these statutes, must make their return to the first writ of *mandamus*.

2 Salk. 429.
pl. 4. 434.
pl. 16.
Ld. Raym.
391.
6 Mod. 25.
Skin. 669.
pl. 7.
2 Ld. Raym.
848. 1233.

If an attachment issues for not returning a *mandamus*, and the sheriff, who is to serve the process, takes bail thereupon, this is such a misdemeanor, for which an attachment will be granted against him; for these are not like attachments in Chancery, for want of an answer, which are only as attachments of process, but are writs on contempt, in nature of executions, and so not bailable by the sheriff.

Mich.
9 Geo. 2.
The King
v. Baskerville,
Sheriff
of Shropshire.

If a *mandamus* is awarded for electing an officer, and there is an equality of votes, so that the electors cannot agree, it is said, that they shall be all brought up as in contempt, and laid by the heels, till they do agree.

6 Mod. 152.
1 Term
Rep. 652.

[A *mandamus* was directed to the two bailiffs, one of whom was for obeying the writ, but the other would not, nor join in the return. The court granted an attachment against both; for they said, it would be endless to try in all cases which was in the right, and it would be always used for a handle of delay.]

Case of the
Bailiffs of
Bridge-
north, 2 Str.
808. 1 Barnard. B. R.
53. S. C.

Where a writ was directed to the mayor and jurats of Rye to admit and swear a jurat; and the mayor claimed an exclusive right to the nomination of him, and the jurats denied any such right in the mayor, so that they could never join in a return, it was consented to try the right in a feigned issue. Rex v. Mayor, &c. of Rye, 2 Burr. 798.

(I) What shall be said a good Return.

AS every *mandamus* issues upon a supposal of some breach and disobedience of the law, or neglect of duty in the person to whom it is directed, the return thereto must be certain to every respect (a); and therefore it is said not to be sufficient to offer such matter as the party may falsify in an action, but also such matter must be alleged, that the court may be able to judge of it,

2 Salk. 432.
pl. 11. Ld.
Raym. 559.
Vent. 111.
[(a) But
certainty to
a certain in-
tent in ge-

neral is all that is requisite here, and determine, whether the party's conduct be agreeable to law or not. which means, what, upon a fair and reasonable construction, may be called certain, without recurring to possible facts, which do not appear. If the return be certain upon the face of it, that is sufficient, and the court cannot intend facts inconsistent with it, for the purpose of making it bad. If presumptions were to be allowed, certainty in every particular would be necessary, and no man could draw a valid and sufficient return. Besides, presumption and intendment, as far as they go, must be in favour of returns, not against them. *Per Buller, J. Dougl. 159.*]

Vent. 110. Therefore, if to a *mandamus* to the Lord President and Council of
The King the *Marches*, to admit a person to the exercise of office of deputy-
v. Clapham. secretary, the return is, that *non fuit tempore receptionis brevis deputatus constitutus*; this is naught; for if he were made his deputy before, the return was true; unless he made him his deputy at the very instant of the receipt of the writ.

2 Salk. 436. To a *mandamus* to admit a person alderman, the party may return,
pl. 10. that he was not qualified, or that he was not elected: also, several
2 Ld. Raym. causes may be returned, but they must be consistent (a); and
1244. The therefore if the return admits a good election, and afterwards
Queen v. avoids it by the matter repugnant, this is naught.
Mayor, &c. of Norwich.

[(a) See *acc. Wright v. Fawcett*, 4 Burr. 2041. *Rex v. Churchwardens of Taunton St. James's*, Cowp. 413. Where several causes returned to a *mandamus* are inconsistent, the whole must be quashed, because the court cannot know which to believe, and it is an objection to the whole return. It is like a declaration in which two inconsistent counts are joined; there, the plaintiff cannot have judgment. But where a return consists of several independent matters not inconsistent with each other, some of which are good at law, and some bad, the court may quash the return as to such as are bad, and put the prosecutor to plead to or traverse the rest. *Rex v. Mayor, &c. of Cambridge*, 2 Term Rep. 456. *Rex v. Mayor, &c. of York*, 5 Term Rep. 66. *Rex v. Archbishop of York*, 6 Term Rep. 493.]

6 Mod. 309. A *mandamus* to swear one into the place of town-clerk; the re-
See Ld. turn was, that upon the election *B.* had eighteen voices, and the
Raym. 225. party who sued the *mandamus* but seventeen; and that they swore
559. in *B.*: it was held a bad return, being argumentative, when it should be express and direct, that he was not chosen.

Raym. 153. A *mandamus* was granted to restore the recorder of *Barnstaple*, directed to the mayor of the corporation; and he returned, *quod non constat nobis* that he was ever elected; and the return was adjudged insufficient, and restitution awarded.

Sid. 209. So, where to a *mandamus* to restore a town-clerk, it was re-
Keb. 655. turned, that he *nunquam debito modo admissus fuit*; it was held a
716. 733. bad return, being a negative pregnant, and involving matter of law, when the plain fact only should be returned, so as to enable the court to adjudge upon it, and the party to bring his action, in case it were false.

Rex v. [So, where a writ of *mandamus*, to certify the election of a re-
Mayor, &c. recorder, stated, that the corporation, being duly assembled, pro-
of York, ceeded to the election of a recorder; a return, that they were
5 Term not duly assembled to proceed to the election of a recorder, was
Rep. 66. holden bad, as being a negative pregnant.]

Carth. 170. But if the *mandamus* suggest, that he was *debite electus*, a return
Lambert's *quod non fuit debite electus* is good, because it answers the suggestion
case. 2 Salk in the writ.
433. pl. 13.

5 Mod. 11. S. P. [2 Str. 1235. S. P. 1 Show. 253. S. P. Andr. 105. S. P. on a *mandamus* to restore.

restore. But see 2 Str. 895. and Dougl. 82. A return to a *mandamus* stating in the words of the writ, that the prosecutor was not DULY ELECTED, admitted, and sworn, was holden to be bad. *Secus*, perhaps, if it had been not duly elected, or admitted, or sworn. *Rex v. Lyme Regis*, Dougl. 79.]

[If a writ set forth all the proceedings of the election, and conclude, "by reason whereof *A.* was elected;" it is a bad return to say "that he was not elected: the defendant should traverse one of the facts alleged.

Rex v. Mayor, &c. of York, 5 Term Rep. 66.

Where an amotion is returned, the return must set out all the necessary facts precisely, to shew that the person is removed in a legal and proper manner, and for a legal cause. It is not sufficient to set out conclusions only; the facts themselves must be set out precisely, that the court may be able to judge of the matter. And so it is as to the *cause* of amotion; that must be set out in the same manner, that the court may judge of it.

Per Lord Mansfield, 2 Burr. 731.

Therefore, where to a *mandamus* to restore *J. S.* to the place of common councilman of *L.*, the defendants returned generally the cause of the amotion by the common council, who were in due manner met and assembled; the court held the return to be bad; for that they were so duly assembled was a conclusion of law; that they should have set out the facts, *viz.* that they had as a select body the power of amotion: that all the members were summoned by regular and proper notice: and that *J. S.* himself was also regularly summoned and heard in his defence.

Ibid.

So, if the amotion were by a part of a corporation, the return should shew how they have such authority, whether by charter or prescription; for as the power of amotion is by the general law in the whole corporation at large, it should appear how the select part is entitled to it.

Rex v. Mayor, &c. of Doncaster, Say. Rep. 37.

But the power of amotion being generally in the whole corporation, it is obvious, that if it is stated, that the party was removed by the corporate body at large, it is unnecessary to aver that the power was vested in them.

Rex v. Lyme Regis, Dougl. 149.

A return in general terms is bad; as, that the party had obstinately refused to obey the rules and orders of the corporation, contrary to the duty of his office, without stating what the rules and orders were.

Rex v. Mayor, &c. of Doncaster, 2 Ld. Raym. 1564.

So, a return of removal for neglect of duty, without stating the particular instances of neglect, has been holden to be bad.

Say. Rep. 37.

On a *mandamus* to restore to the office of a capital burghess, if the return state the ground of disfranchisement to have been, the nonattendance of the prosecutor at a meeting to which he was summoned for the election of a capital burghess, an averment, that the right of such election is in the capital burghesses being the common council, does not assert with sufficient certainty, that he had a right to concur in the election, and ought to have obeyed the summons, because, consistently with such an averment, he might not have that right, it not appearing thereby that all the capital burghesses are members of the common council.

Rex v. Lyme Regis, Dougl. 177.

If a writ be directed to a corporation by a wrong name, they may return this special matter, and rely upon it; but if they an-

2 Salt. 434-5.

swer the exigency of the writ, they cannot take advantage of the misnomer.

2 Salk. 431. If the supposal of the writ be false in not truly stating the constitution of the corporation, it will not be sufficient for the return to state it truly; the defendants must also deny the supposal of the writ.]

(K) Of traversing the Return, and taking Issue thereon.

Vent. 111.

2 Salk. 432.

pl. 8.

1 Str. 58.

1 Show. 335.

Ld. Raym.

481.

THE party to the return of a *mandamus* could not traverse nor interplead, which is one reason why the utmost certainty was required in such return.

But now by the 9 *Ann. c. 20.* reciting, that divers persons had illegally intruded themselves into, and taken upon them to execute the office of mayors, bailiffs, port-reeves, and other offices within cities, towns corporate, boroughs, and places; and the great difficulty of determining, where the office was annual, the right to the same, within the compass of the year, or where it was not annual, the difficulty of determining the right, before the persons had done divers acts prejudicial to the peace and order of such city, &c. and reciting the great difficulty persons illegally turned out, or refused to be admitted, lay under, and the dilatoriness and expence attending the proceedings on writs of *mandamus*; it is therefore enacted, "That as often as, in any of the cases aforesaid, any writ of *mandamus* shall issue out of the King's Bench, the courts of sessions of counties palatine, or out of any the courts of the grand sessions in *Wales*, and a return shall be made thereunto, it shall and may be lawful to and for the person or persons, suing or prosecuting such writ of *mandamus*, to plead to or traverse all or any the material facts contained within the said return; to which the person or persons making such return shall reply, take issue, or demur; and such further proceedings, and in such manner, shall be had therein, for the determination thereof, as might have been had if the person or persons, suing such writ, had brought his or their action on the case for a false return; and if any issue shall be joined on such proceedings, the person or persons suing such writ, shall and may try the same in such place, as an issue joined in such action on the case should or might have been tried; and in case a verdict shall be found for the person or persons suing * such writ, or judgment given for him or them on demurrer, or by *nil dicit*, or for want of a replication or other pleading, he or they shall recover his and their damages and costs, in such manner as he or they might have done in such action on the case as aforesaid; such costs and damages to be levied by *capias ad satisfaciendum*, *fieri facias*, or *elegit*, and a peremptory writ of *mandamus* shall be granted without delay, for him or them for whom judgment

* Where defendants shall recover costs, vide § 5. of this statute.

" shall

“ shall be given, as might have been, if such return had been
 “ adjudged insufficient; and in case judgment shall be given for
 “ the person or persons making such return to such writ, he or
 “ they shall recover his or their costs of suit, to be levied in man-
 “ ner aforesaid *.”

* By § 70.
 of this sta-
 tute, the
 statutes of
 amendment
 and jeofails
 are extended

to proceedings on writs of *mandamus*.—If in a proceeding under the statute, no damages are given by the jury, the want of it cannot be supplied by a writ of inquiry; but in such case the party may bring an action for a false return; for the act does not take away the party's right to bring such action, but only provides that in case damages are recovered, by virtue of that act, against the persons making the return, they shall not be liable to be sued in any other action, for making such return. *Stra.* 1051.—There are many cases to which the statutes do not extend.—In all those cases the proceedings must be according to the course of the common law.

(L) Of the Party's Remedy for a false Return.

IT is clearly agreed, that for a false return to a *mandamus* an action on the case lies; as, if upon a *mandamus* to restore *T. S.* to his place of burghs of *P.* the mayor, &c. return a good cause, the matter of which is false, an action lies for the false return.

11 Co. 99.
 Bagg's case.
 [An action
 will lie for
 a suppressio
 veri in a re-
 turn, as well as for an *allegatio falsi*.
Dougl. 149.]

Also it hath been adjudged, that where the return is made by several persons, the action may be either joint against all, or several, being founded on a tort or injury; as, if made by the mayor and aldermen, the action may be brought against the mayor only; and if upon evidence it appears, that he voted against the return, but was over-ruled by the majority, the plaintiff will be non-suited †.

Carth. 171,
 172. Sir
 Peter Rich
 v. Pilkington,
 Lord Mayor of
 London,
 6 Mod. 152.
 S. P.
 † Where

several join in an application for a *mandamus*, they must all join in the action for a false return. 1 *Ld.* Raym. 125.

[The return need not be under the seal of the corporation, nor need the mayor sign it; and if an action be brought against the mayor for a false return, it will be a sufficient evidence against him, that the *mandamus* was delivered to him, and has such a return, unless he can shew the contrary.

Rex v.
 Mayor of
 Exeter,
 1 *Ld.* Raym.
 223. Bull.
 N. P. 209.

In an action for a false return the plaintiff set out, that he was chosen upon the first of *October*, according to the custom. Upon evidence it appeared, that the custom was to choose upon the 29th of *September*, and that the plaintiff was then chosen; and this was holden sufficient to support the declaration; for the day in the declaration is but form.

Vaughan
 v. Lewis,
Carth. 218.

In an action for a false return, it is not material whether the writ issued properly or not.]

Green v.
 Pope, 1 *Ld.*
 Raym. 126.

Also, if the matter concerns publick government, and no particular person is so far interested as to maintain an action, the court will grant an information against the particular persons that made the return ‡.

Salk. 574.
 pl. 16.
Ld. Raym.
 584. ‡ The
 return must

be filed and allowed before the information can be moved for.

[Clerical mistakes in returns may be amended after they are filed.]

Rex v.
 Lyme Regis,
Dougl. 135.

(M) Of awarding a peremptory *Mandamus*.

11 Co. 99.
1 Str. 145.
609.

(a) That
on falsify-
ing the re-

turn, in an action on the case, no motion can be made for a peremptory *mandamus* till four days are past after the return of the *posse*; because the defendant has so long to move an arrest of judgment. 2 Salk. 430, 431. (b) Not to be granted in the first instance. Skin. 669. pl. 7. (c) But it is said, that if the court does not see cause of restitution, though there be no good return to the writ, yet they will not grant a peremptory *mandamus*. 7 Mod. 83, 84.

2 Salk. 428.
pl. 1. 1 Ld.
Raym. 216.
Skin. 670.
pl. 8. S. C.

But the action which falsifies the return, is to be brought in that court out of which the *mandamus* issued; and therefore where in an action on the case in *C. B.* for a false return to a *mandamus*, judgment was given for the plaintiff on demurrer; yet the court of *B. R.* refused to grant a peremptory *mandamus*; because every *mandamus* recites the fact *prout nobis constat per recordum*, which cannot be said in this case, as the court cannot take notice of the records of the Common Pleas.

Foot v.
Prowse,
2 Str. 697.

[The judgment of the Exchequer-chamber, whereby the judgment of *B. R. pro defendente* was reversed, being affirmed in parliament, the plaintiff moved for a peremptory *mandamus*, insisting, that he had now falsified the return, and, consequently, set aside the defendant's excuse. But it was objected, that no peremptory *mandamus* ought to go, unless, besides the reversal of the judgment given for the defendant, there had been also a new judgment given for the plaintiff; that a peremptory *mandamus* is a judicial writ, and must be founded upon some judgment establishing the right of the party who applies for it: *P. C. Philips v. Bury*, 2 Salk. 431. *Cro. Ja.* 206. *Yelv.* 74. 2 *Ventr.* 295. *P.* 10 *Ann.* *Lidd v. Rod*, *Tr.* 7 *Ann.* *Hicks v. Sherburn*, 1 *Br. P. C.* 328. But *per curiam*—A peremptory *mandamus* ought to go; for this is not a judicial writ founded upon the record, but is a mandatory writ, which the court always grant, when they are satisfied of the party's right. The reversal of our judgment is a declaration by the superior court, that the plaintiff had a right; and there is no occasion for any new judgment. We every day grant peremptory *mandamuses* on producing the *posse*, which shews a formal judgment is not necessary. A peremptory *mandamus* was awarded.

Ruding v.
Newel,
2 Str. 983.

But a peremptory *mandamus* is not grantable pending a writ of error.

It is enacted by stat. 9 *Ann. c.* 20. § 2. that “where any *mandamus* shall issue to admit or restore any burgesses, &c., and a return shall be made, and a verdict be found for the persons suing such *mandamus*, or judgment be given for them, a peremptory *mandamus* shall be granted without delay, as if such return had been adjudged insufficient.”

Dean, &c.
of Dublin,
v. Dowgatt,

Since this statute a *mandamus* is in nature of an action, special replications and pleadings therein being admitted, and costs given

to either side that prevails, and error lies upon a judgment given therein. Yet it hath been solemnly determined, that no writ of error will lie on a peremptory *mandamus*; for such a construction would entirely defeat the end of the statute, and prevent the officer, who was chosen annually, from having any fruit of the *mandamus*.]

Herle, 3 Br. P. C. 178. S. P. upon the authority of the above case of Dean, &c. of Dublin v. Dowgarr.

1 P. Wms. 348.
8 Mod. 27.
S. C. 1 Str. 536. S. C. 2 Br. P. C. 554. S. C. Pender v.

Marriage and Divorce.

MARRIAGE is a compact between a man and a woman for the procreation and education of children; and seems to have been instituted as necessary to the very being of society; for, without the distinction of families, there can be no encouragement to industry, or any foundation for the care of acquiring riches. All well-ordered societies have therefore guarded the marriage rite with religious solemnities, and ordained that the contract should be indissoluble during the joint lives of the parties. And the reason of this latter provision is, because children gradually succeeding one another, the parents have hardly done with the care of their education, before they are themselves unfit for a second marriage. It is also fit, that marriages should continue during life, that the mutual care of the parents may be employed in making provision for their children; and that the love and respect of the children may be returned to both parents without distraction or confusion. Besides, the common interest could not be so well provided for, if there were a prospect that the marriage was any otherwise to be determined but by death only; for each person would be injuriously drawing out of the common stock, to the injury of their joint concern, and to the prejudice of the education of their offspring: nor can such a joint interest be well and commodiously carried on without a mutual friendship and endearment, which must be lessened and destroyed by the prospect, that the contract may be determined by the humour of either party. Hence it is, that fornication and all other lusts are unlawful, because children are begotten without any care or preparation for their education; and the crime of adultery receives this further aggravation, that it not only entails a spurious race on the husband, for whom he is under no obligation to provide, but likewise destroys that peace and mutual endearment which ought always to subsist in the marriage state,

[Some

[Some ancient nations appear to have been more sensible of the importance of marriage institutions than we are. The *Spartans* obliged their citizens to marry by penalties, and the *Romans* encouraged theirs by the *jus trium liberorum*. A man, who had no child, was entitled by the *Roman* law only to one-half of any legacy that should be left him, that is, at the most, could only receive one-half of the testator's fortune. With us, the laws hold out no temptation to marriage, and prudence will, in general, recommend celibacy.]

We shall consider what is enjoined or forbidden with respect to marriage under the following heads :

- (A) What Persons may marry, and particularly within the Levitical Degrees.
- (B) Of Espousals and Marriage Contracts : And herein of the Difference between Contracts *in præfenti* and *futuro*, and the Remedies for the Violation thereof.
- (C) Of the Solemnization and Ceremonies requisite to a complete Marriage : And herein of the Offence of performing the Ceremony without due Authority or Licence.
- (D) Of Offences against the Rights of Marriage : And herein,
 - 1. Of the Offence of a forcible Marriage.
 - 2. Of the Offence of marrying an Infant Female under the Age of sixteen, without Consent of Guardian.
 - 3. Of the Offence of procuring an improvident Marriage ; and therein of Marriage-Brochage Contracts and Agreements.
- (E) Marriage how long to continue : And herein of the several Kinds of Divorces ; and herein,
 - 1. Of Elopement.
 - 2. Of the Offence of taking away a Wife, and of criminal Conversation.
 - 3. Of the several Kinds of Divorces.

(A) What

(A) What (a) Persons may marry, and particularly within the Levitical Degrees.

(a) At what age persons may contract and in-
tract and in-
tract and in-

termarry, *vide* head of Infants.—Of marriages by idiots and lunatics, *vide* head of Idiots and Lunatics.

[I]T is enacted by 26 G. 2. c. 33. § 11. that “ all marriages, solemnized by licence, where either of the parties, not being a widow or widower, shall be under the age of 21 years, which shall be had without the consent of the father of such of the parties, so under age, (if then living,) first had and obtained, or if dead, of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then of the mother, if living and unmarried; or, if there shall be no mother living and unmarried; then of a guardian or guardians of the person appointed by the court of Chancery, shall be absolutely null and void to all intents and purposes whatsoever.”

This has been adjudged to comprehend the marriages of illegitimate persons under the age of twenty-one years. *Rex v. Hoonett, 1 Term Rep. 96.*

But, by § 12. “ in case any guardian or mother whose consent is made necessary as aforesaid, shall be *non compos mentis*, or beyond sea, or withhold his or her consent to the marriage of any person, such person desirous to marry may apply by petition to the Lord Chancellor, who may proceed upon such petition in a summary way; and if the marriage proposed shall on examination appear to be proper, he shall judicially declare the same to be so, by an order of court, and such order shall be as effectual, as if such guardian or mother had consented.”

The marriages of the royal family being excepted from the salutary restraints of this act, it is enacted by stat. 12 G. 3. c. 11. that no descendant of the body of King George the second, male or female, (other than the issue of princesses who have married, or may hereafter marry, into foreign families,) shall be capable of contracting matrimony without the previous consent of his majesty, his heirs or successors, signified under the great seal, and declared in council, (which consent, to preserve the memory thereof, is hereby directed to be set out in the licence and register of such marriage, and to be entered in the books of the privy council); and that every marriage, or matrimonial contract, of any such descendant, without such consent first had and obtained, shall be null and void to all intents and purposes whatsoever.”

“ Provided, that in case any such descendant, being above the age of twenty-five years, shall persist in his or her resolution to contract a marriage disapproved of, or dissented from, by the king, his heirs or successors; that then such descendant, giving notice to the king’s privy council, which notice is hereby directed to be entered in the books thereof, may, at any time from the expiration of twelve calendar months after such notice given to the privy council as aforesaid, contract such marriage; and

his

“ his or her marriage with the person before proposed, and re-
 “ jected, may be duly solemnized without the previous consent
 “ of his majesty, his heirs or successors; and such marriage shall
 “ be good, as if this act had never been made, unless both houses
 “ of parliament shall, before the expiration of the said twelve
 “ months, expressly declare their disapprobation of such intended
 “ marriage.”]

(a) For the
 general ex-
 position of
 this statute,
vide Co. Lit.
 24. 235.
 2 Inst. 683,
 4. Hob. 181.
 (b) But the
 statute does

By the statute of (a) 32 H. 8. c. 38. it is enacted, “ That
 “ no reservation or prohibition (God’s law except) shall trouble
 “ or impeach any marriage without the (b) Levitical degrees; and
 “ that no person, of what estate, degree, or condition soever he
 “ be, shall be admitted to any of the spiritual courts within the
 “ king’s realm, or any of his grace’s other lands and dominions,
 “ to any process, plea, or allegation contrary to the statute.”

not restrain the ecclesiastical courts from divorces upon other accounts; as, upon the account of insuf-
 ficiency, adultery, pre-contract, &c. *Vaugh.* 206, &c.

Vaugh. 206,
 &c.

Since this statute, it hath been clearly agreed, that if the spi-
 ritual courts proceed to impeach or dissolve a marriage out of the
 Levitical degrees, that then the temporal courts are to prohibit
 them; for by that statute all marriages, that are out of those de-
 grees, are declared to be good and lawful; and therefore, if the
 spiritual court molest persons in doing that which is declared law-
 ful to be done by the statutes of the realm, they are by the tem-
 poral courts to be prohibited, because they exceed their jurisdic-
 tion, thus bounded by the temporal law; but where the law has
 not bounded them, their jurisdiction still continues; and therefore
 within the Levitical degrees they are still judges of incest.

Roll. Abr.
 340. 357.
Vaugh. 208.
 220.

We must likewise observe, that if a person marry his cousin
 within the Levitical degrees, yet they continue husband and wife,
 till a sentence of divorce be pronounced.

The degrees prohibited by the Levitical law, are such as are said
 to be against the law of nature, and such as are against the divine
 positive law.

Grot. de
Jure, lib. 2.
c. 5. Vaugh.
 221. 242.
 &c.

Those against the law of nature, are all marriages between the
 ascending and descending line *in infinitum*; and this is said to be
 contrary to the law of nature, because it tends to the destruction
 of the natural will of the Creator, which designed the preservation
 and continuance of such inhabitants of the world as he originally
 created; and all acts of men that tend to the destruction of such
species, as murder of an innocent person, are said to be against the
 law of nature; and therefore incest, between the ascending and
 descending line, is contrary to the law of nature; for the mother
 would never have preserved and educated the female issue, if it had
 been admitted to the father to have had access to them; and fa-
 thers would never have educated and preserved their male issue, if
 they might have ascended the bed of their mothers. There is
 also another reason why this is called unnatural, and that is, be-
 cause it destroys the natural duties between parents and children;
 for the parent could never preserve or maintain that authority that
 is necessary for the education and government of his child; nor the

the child that reverence that is due to the parent in order to be educated and governed, if such indecent familiarities were admitted. There likewise seems to be a natural reason against this, or any near intercourse between collaterals, which is drawn from that which is observed in brute creatures, *viz.* that it is necessary to cross the strain, in order to continue the *species*. It may be, that there being the same tone and figure in the blood, and a similar conformation of vessels, the circulation of it becomes torpid and inactive; whereas a new mixture of others of the same kind, where there is a different figure and motion of the blood and spirits, may add a new vigour and ability to the animal economy.

Those prohibited by the positive divine law, are all collaterals to the third degree; and though this be not contrary to the law of nature, yet it seems established on very strong reasons; for if a concourse between brothers and sisters might be allowed, or their marriages be tolerated, the necessity there is that they should be educated together, and the frequent opportunities they have with each other, would fill every family with lewdness, and create heart-burnings and unextinguishable jealousies between brothers and sisters, where the family was numerous; and it would confine every family to itself, and hinder the propagating common love and charity among mankind; because there would be a danger of taking a wife out of any family, if women were liable to be corrupted by such vicious freedoms. This prohibition is likewise carried to uncles and aunts, nephews and nieces; because upon the death of the father and mother they come into the education of children *loco parentum*; and, by consequence, it was necessary to propagate the same reverence of blood in such near degrees, that the uncle might have the same regard and command as a father, and a niece the same duty as a daughter; it was also necessary, in order to perfect the union of marriage, that the husband should take the wife's relations in the same degree, to be the same as his own without distinction, and so *vice versa*; for if they are to be the same person as was intended by the law of God, they can have no difference in relations; and, by consequence, the prohibition touching (a) affinity must be carried as far as the prohibition touching consanguinity.

Vaugh. 212.
[Mr. Hume observes, that "the natural reason, why marriage in certain degrees is prohibited by the civil laws, and condemned by the moral sentiments of all nations, is derived from men's care to preserve purity of manners; while they reflect, that if a commerce of love were authorized between

"the nearest relations, the frequent opportunities of intimate conversation, especially during early youth, would introduce an universal dissoluteness and corruption. But as the customs of countries vary considerably, and open an intercourse, more or less restrained, between different families, or between the several members of the same family, so we find, that the moral precept, varying with its cause, is susceptible, without any inconvenience, of very different latitude in the several ages and nations of the world. The extreme delicacy of the Greeks permitted no converse between persons of the two sexes, except where they lived under the same roof; and even the apartments of a step-mother, and her daughters, were almost as much shut up against visits from the husband's sons, as against those from any strangers or more remote relations. Hence, in that nation, it was lawful for a man to marry, not only his niece, but his half-sister: a liberty unknown to the Romans, and other nations, where a more open intercourse was authorised between the sexes." Hist. vol. 4. 110.] (a) According to the text xviii. Levit. ver. 16. *The nakedness of thy brother's wife shalt thou not uncover, it is thy brother's nakedness.*

The law in *Leviticus, cap. xviii. ver. 6.* is, *That none of you shall approach to any that is near of kin, to uncover their nakedness;* which words being general, must be understood and expounded by

By the examples from the 6th to the 20th verse; among which we find many prohibitions to collaterals in the third degree, both in affinity and consanguinity; but there is no example of collaterals in the fourth degree, either in affinity or consanguinity; and therefore the law of marriage opens to relations in the fourth degree; and the Jewish lawyers, in computing their degrees, computed them according to the natural order of things; that is, from the *propositus* up to the common stock, and so down to the other relations; which is the fair and natural order of computing proximity; and in this order of computation, cousin-germans are held to be of the fourth degree, and to have liberty to marry.

Selden, Ux.
Hebraica,
lib. 1. c. 4.

Vaugh.
210.

This likewise was the ancient sense of the Christian church; and even of the church of *Rome* in the time of Pope *Gregory*; for in writing to *Austin* Bishop of *Canterbury* he says, *In quartâ generatione contracta matrimonia minime solverentur*; but afterwards, when they found that dispensations for incestuous marriages brought great profit to the church of *Rome*, and knowing it had obtained universally in the Christian church, that it was lawful to marry in the fourth degree, Pope *Alexander II.* began a new computation of degrees; and he said, that the secular computation, which was the computation of the civil law, was not properly adapted to the decisions touching incestuous marriages; but they ought to compute up to the common stock, where the relation joined, because there the blood was connected; and therefore they computed the degrees according to the distance of the person remotest from the common stock; for according as the remotest was distant from the common stock, so they computed the relation between the parties; so that the first cousins that are in the fourth degree, by the received computation in the *Mosaick* and civil law; were now by the canonical computation thrown into the second degree; and by this alteration of the computation of degrees, they forbid not only first cousins but second and third cousins to marry, unless they obtained dispensations.

The intention of the statute above mentioned was to restore every thing according to the prohibition expressed in the law of God; and plainly, the Levitical computation of degrees was in the manner they computed in the civil law; and agreeably hereunto hath been the resolution in our law.

Vaugh.
302. Hill
v. Good.
Earth. 27 r.
S. P. ad-
mitted.

Hence it hath been adjudged, that the marriage of two sisters, one after the other, was incestuous, being in the second degree; although it was objected, that the verse in *xviii Levit.* being, *thou shalt not take a wife to her sister to vex her*, &c. the prohibition relating to polygamy, to jealousy and vexing, the reason thereof ceased with the death of the first wife; in the same manner as if *Moses* had said, *thou shalt not take a wife to her sister to vex her*, besides the other in her lifetime. But herein the court held, that though the vexing, in one part of the text, related to the life of the wife, yet by another part it is made unlawful for ever; and that from these words, *None of you shall approach to any that is near of kin to him, to uncover their nakedness*; which makes the nearness of kin the chief cause of the prohibition, and is the reason that runs

through the whole chapter; and that therefore the vexing refers only to the life of the wife, but the incestuous copulation is the same after her death, the nearness of kin still continuing.

So, it hath been resolved, that marrying the sister's daughter is incestuous, being in the third degree. Raym. 464. Watkinson

v. Mergatron. 2 Jon. 191. S. C.

So, it hath been resolved in variety of books and cases, that the marriage with the wife's sister's daughter was incestuous, being likewise in the third degree; and the degree of affinity being the same with that of consanguinity.

Moor, 907.

Cro. Eliz.

228.

4 Leon. 16.

S. C.

Man's case.

2 Lev. 254. 3 Keb. 660. Hob. 181. Noy, 29. Sid 434. 2 Jon. 118. 2 Show. 70. 5 Mod. 448.

But upon a prohibition, for proceeding against a person in the ecclesiastical court who had married the widow and relict of his great uncle, it was adjudged, that such marriage, being in the fourth degree, was out of the Levitical law, and therefore lawful.

Vaugh. 206.

2 Vent. 9.

Harrison &

ux. v. Dr.

Burwell.

On a motion for a prohibition to the court of the Bishop of *Exon*, for presenting *J. S.* for incest, who had married the daughter of his brother of the half blood; it was resolved, that no prohibition should go; for the court said, though the brothers were not of the whole blood, yet were they brothers, and therefore the marriage incestuous; they agreed, that if the father marries the mother, and the son the daughter, this was lawful enough; and *North* cited the case of the Earl of *Manchester*, who had married his great aunt's husband's second wife; and this was held by divines and civilians a good marriage, for *affinis mei affinis non est mihi affinis*.

Mich.

30 Car. 2.

in C. B.

Oxtenham

& ux. v.

Gayre.

On a motion for a prohibition, for proceeding against a person in the ecclesiastical court, who had married his sister's bastard daughter; it was urged for the prohibition, that though the Levitical law forbids a man to approach to any near of kin to uncover their nakedness, yet that this cannot be intended of a bastard, because he is of kin to no person whatsoever (*a*), &c. but the court inclined not to grant a prohibition.

5 Mod. 161.

Hains v.

Jescott.

Comb. 356.

S. C.

[Com. Rep.

2. S. C.

1 Ld. Raym.

68. S. C.

(a) This

objection of being *nullius filius*, and therefore having no consanguinity, must be understood only as to civil purposes, and is to be confined chiefly to inheritances, 1 Term Rep. 101. for there is a relation as to moral purposes; and hence a bastard cannot marry his own mother, or bastard sister. 3 Salk. 66.]

(B) Of Espousals and Marriage Contracts: And herein of the Difference between Contracts *in presenti* and *futuro*, and the Remedies for the Violation thereof.

Swinburne defines espousals in this manner, *sponsalia sunt mutua repromissio nuptiarum rite inter eos, quibus jure licet, facta*; which comprehends, 1st, That this promise must be mutual; 2^{dly}, That it must be done *rite*, or duly; 3^{dly}, That it must be entered into by them who may lawfully marry.

Swinb. of

Espousals,

§ 11.

Such contracts are divided into contracts *in presenti*, and contracts *in futuro*.

Swinb. 74. A contract *in presenti*, or *per verba in presenti*, as, *I marry you,*
2 Salk. 438. *you and I are man and wife, &c.*, is by the civil law esteemed *ipsum*
pl. 3. *matrimonium*, and amounts to an actual marriage; which the very
6 Mod. 155. parties themselves cannot dissolve by release, or other mutual
(a) Also a marriage in agreement; it being as much a marriage in the sight of God, as if
fact or re- it had been *in facie ecclesie*, with this difference, that if they cohabit
putation, is held good in the temporal courts; but before marriage *in facie ecclesie*, they are for that punishable by
when the ecclesiastical censures; and if, after such contract, either of them
validity of lies with another, such offender shall be punished as an adulterer.
the marriage shall be tried in the spiritual courts, and not by verdict, *vide tit. Bastardy*. In debt on a
bond, the defendant pleaded *ne unques accouple* in loyal matrimony; plaintiff demurred, and had judg-
ment; for it alters the trial; for instead of trying *per pais*, it puts the trial on a certificate from the Or-
dinary. Secondly, It admits a marriage, but denies the legality of it; whereas a marriage *de facto* is
sufficient, and whether loyal or not loyal, is no ways material. 2 Salk. 437. pl. 2. So, in an assault
and battery by baron and feme, the defendant pleaded *ne unques accouple* in loyal matrimony; and on de-
murrer, the plea was held naught. Comb. 473. So, in trespass for taking his wife, and the like plea,
which was held naught. Comb. 131. [In genera', common reputation, and cohabitation as man
and wife, or the acknowledgment of the parties, may be admitted as evidence of marriage in the tem-
poral courts. Comb. 202. Cowp. 232. 2 Bl. Rep. 877. Espin. Ni. Pr. Caf. 213. A jury also
are the proper judges of the fact of a marriage denied by an answer in Chancery, and always lean to
support the proof of it, in favour of a just creditor, suing for a debt contracted during cohabitation.
2 Vez. 270. And it is for the most part incumbent on those who would impeach a reputed marriage,
to shew wherein its irregularity consists. Burr. Set. Ca. 232. 1 Salk. 119.]

Swinb. § 10, A contract *in futuro*, as, *I will marry you, &c.*, may be enforced
11. This in the spiritual court, but such contract either party may release:
remedy is also, if either party marry another person, such second marriage
taken away dissolves the contract.
by 26 G. 2.

c 33. § 13. But it hath been resolved, that an action will lie at common law
Leon. 147. for the violation of such an executory contract *per verba de futuro*,
Roll. Abr. for the temporal loss to the party; and though the party hath a
22. Cro. remedy in the spiritual court. But it seems, that by bringing an
Eliz. 79. action at common law, and that appearing on record, the remedy
Styl. 295. in the spiritual court is actually released; for now in lieu of a per-
Carter, 233. formance of the contract he shall recover damages: also, the de-
Dickinson fendant shewing, that he hath been sued for the same matter in
v. Holecroft, the spiritual court, and producing a sentence against the plaintiff,
Salk. 24. the plaintiff, notwithstanding any proof of his, will be nonsuit;
pl. 6. because the spiritual court were the proper judges, whether it
5 Mod. 411. were a precontract or not.
6 Mod. 172.

Salk. 120. Such promises are good, though the time of marriage be not
pl. 1. 121. agreed on; but in such case it is necessary, to entitle the party to
2 Stra. 938. his action, to allege that he offered to marry her, and that she
Carth. 467. refused.

Carth. 467. In an action against husband and wife, the plaintiff declared,
Salk. 24. that he promised to marry the defendant's wife, while sole, and
pl. 6. S. C. that she the same time promised to take him for her husband; and
Harrison v. averred, that he tendered himself, and that she refused, &c. It
Cage & ux. was objected, that marriage was no advancement to a man, though
5 Mod 411. it was to a woman; also, that no time was laid when this agree-
2 Salk. 437. ment
pl. 2. S. P.

ment was to have been executed: but the court over-ruled both objections. and the distinction as to whether a man or a woman exploded.

This action must be founded on reciprocal promises; and therefore, if the promise be on one side only, it does not bind, being only *nudum pactum*. Salk. 24. pl. 6.

But if a man of full age and a female of fifteen promise to intermarry, and afterwards the man marries another, an action lies against him; for though such promise may be said to be voidable, as to the infant, yet it shall be binding on the person of full age, who shall be presumed to have acted with sufficient caution; otherwise this privilege allowed infants, of rescinding and breaking through their contracts, which was intended as an advantage to them, might turn greatly to their prejudice. Trin. 5 & 6 Geo. 2. Holt v. Ward, 2 Stra. 850. 957. Barnard. K. B. 209. Fitzgib. 175. 3 Ark. 306. Moor, 169. 4 Co. 29. S. C. Sid. 13. S. C. cited, and denied by Twissden; & vide S., and then because such marriage was not void, but voidable only, by reason of the precontract. Moor, 226. Perk. 34.——

If *A.* contracts himself to *B.*, and after marries *C.*, and *B.* sues *A.* upon this contract in the spiritual court, and there sentence is given, that *A.* shall marry and cohabit with *B.*, which he does accordingly; they are baron and feme (*a*), without any divorce between *A.* and *C.*, for the marriage of *A.* and *C.* was a mere nullity*.

Salk. 120. pl. 1. 121. (*a*) But if a woman maketh a contract of matrimony with *J. D.*, who is seized of lands and dieth, she shall have dower of his lands; marriage was not void, but voidable only, by reason of the precontract. Moor, 226. Perk. 34.——

* But now *vide* 26 Geo. 2. c. 33.

It hath been held, that the clause in the statute of frauds and perjuries, 29 Car. 2. c. 3. § 4. relating to marriage-agreements, extends as well to a promise to marry, as to the payment of marriage-portions. 2 Lev. 65. but Skin. 196. pl. 10. seems cont. & Stra. 34. Ld. Raym.

387. 2 Eq. Caf. Abr. 248. are expressly so. A promise to marry another, if broken, where the promises are mutual, and the parties might legally contract, subjects the person, breaking such promise, to an action for damages, notwithstanding the statute: for such actions are every day maintained.

(C) Of the Solemnization and Ceremonies requisite to a complete Marriage: And herein of the Offence of performing the Ceremony without due Authority or Licence.

IN order to make the marriage complete, so as to entitle the wife to dower, the issue to inherit, &c., the same must be celebrated *in (b) facie ecclesiæ*; and therefore the private contract, without the priest's blessing, makes no marriage; though such contract may be enforced in the spiritual court. Roll. Abr. 357. Moor, 169. As to the loyalty of marriage, and of the different

kinds of trial, *vide* tit. Bastard. (*b*) Before the time of Pope Innocent the Third, there was no solemnization of marriage in the church; but the man came to the house where the woman inhabited, and led her home to his own house, which was all the ceremony then used. Moor, 170. Per Goldingham, Doctor of the Civil Law, *arguendo*. [Marriages in England during the usurpation were solemnized before justices of the peace, but for what purpose this novelty was introduced, except to degrade the clergy, does not appear.]

Also, though the marriage be solemnized *in facie ecclesiæ*; yet, if it were without consent, it is void; and therefore if a man takes Roll. Abr. 340. Co. Lit. 33. E. S.

6 Co. 22. *E. S. to wife by dures,* the same is void, though solemnized *in facie ecclesie.*
 Keilw. 52.
 Dyer, 13.
 Cro. Car. 488. 4. 3. Sid. 65. [It is only mentioned as a doubt in Roll's Abridgment, whether marriages by dures are not merely void: surely they are not so before sentence. They are marriages *de facto*. Cro. Car. 493. And Mr. Noy held them good, Dy. 13. in marg.]

Salk 119. *A. and B. being sabbatarians, were married by one in their own*
 pl. 14. way, who used the form of the common prayer, except the ring,
 Heydon v. but was a mere layman; the wife dying, the husband took out
 Gould, & administration to her; but upon application of her sister, the let-
 vide 2 Salk. ters of administration were repealed, and the sentence of appeal
 438. pl. 3. affirmed by the delegates; for the husband, demanding a right
 3 Lev. 376. due to him as husband, must bring himself within the rules pre-
 2 Show. 300. scribed by that jurisdiction to whom he applies: also, the constant
 pl. 303. form of pleading marriage is, that it was *per presbyterum sacris*
ordinibus constitutum; and an act of parliament was made confirm-
 ing the marriages contracted during the usurpation.

5 Co. 32. A marriage solemnized by a person in priest's orders is good and
 Co. Lit. 344. binding, though there was no publication of banns or licence to
 Jon. 259. dispense therewith: but herein it seems agreed, that not only the
 2 Salk. 673. party performing the ceremony, but also the parties married,
 6 Mod. 189. being lay persons, are punishable by ecclesiastical censures; and
 2 Str. 1056. for acting contrary to such ancient canons as have been received
 2 Atk. 650. and allowed in this kingdom: but it seems agreed, that the canons
 of 21 Jac. 1. bind not the laity, not having been universally re-
 ceived, and being made only in convocation where the laity are
 not represented.

The use of [By 26 G. 2. c. 33. § 2. No minister shall be obliged to publish
 matrimo- the banns of matrimony between any persons whatsoever; unless
 nial banns is they shall seven days, at the least, before the time required for the
 said to have first publication, deliver or cause to be delivered to him a notice
 been first in- in writing of their true christian and surnames, and of the houses
 troduced in of their respective abodes, within such parish, chapelry, or extra-
 the Gallican parochial place, where the banns are to be published, and of the
 church, time, during which they have inhabited or lodged in such houses
 though respectively
 something like it ob-
 tained even
 in the primitive times, and it is this Tertullian is supposed to mean by *trinundina promulgatio*.

§ 1. All banns of matrimony shall be published in the parish church,
 or in some publick chapel, wherein banns of matrimony have been
 usually published, of the parish or chapelry wherein the persons
 to be married shall dwell.

And where the persons to be married shall dwell in divers parishes
 or chapelries, the banns shall be published in the church or chapel
 belonging to such parish or chapelry wherein each of the said
 persons shall dwell.

And where both or either of the persons to be married shall
 dwell in any extraparochial place, (having no church or chapel
 wherein banns have been usually published,) then the banns shall
 be published in the parish church or chapel belonging to some
 parish or chapelry adjoining to such extraparochial place.

§ 5. Note—That all parishes, where there shall be no parish church
 or chapel thereto, or none, wherein divine service shall be usually
 celebrated

celebrated every *Sunday*, may be deemed extraparochial places for the purposes of this act, but for no other purpose.

Provided, That after the solemnization of any marriage under § 10. a publication of banns, it shall not be necessary, in support of such marriage, to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published, nor shall any evidence in such case be received to prove the contrary in any suit touching the validity of such marriage.

And the said banns shall be published upon three *Sundays* preceding the solemnization of marriage, during the time of morning service, or of the evening service, if there be no morning service, in such church or chapel, on any of those *Sundays* immediately after the second lesson. § 1.

Whilst the marriage is contracting, the ministers shall inquire Lindw. 271. of the people by three public banns, concerning the freedom of the parties from all lawful impediments. And if any minister do otherwise, he shall be suspended for three years.

And in case the parents or guardians, or one of them, of either of the parties, who shall be under the age of 21 years, shall openly and publicly declare, or cause to be declared, in the church or chapel where the banns shall be so published, at the time of such publication his dissent to such marriage, such publication shall be void. St. 26 G. 2. c. 33. § 3.

And where the parties dwell in divers parishes, the curate of the one parish shall not solemnize matrimony betwixt them, without a certificate of the banns being thrice asked from the curate of the other parish. Rubr.

And by the 26 Geo. 2. c. 33. § 1. Where the banns shall be published in any church or chapel belonging to any parish adjoining to any extraparochial place as aforesaid, the minister, publishing such banns, shall in writing, under his hand, certify the publication thereof, in such manner, as if either of the parties to be married dwelt in such adjoining parish.

As to licences, some have questioned the bishop's power to grant licences for marrying without banns first published; because this is dispensing with an act of parliament: for the marriage office, which requires banns, is part of the statute law. But this power of dispensing is granted to the bishop by statute law too, viz. by the 25 H. 8. c. 21. by which all bishops are allowed to dispense, as they were wont to do, and such dispensations have been granted by bishops ever since Archbishop *Mepham's* time at least. Johnf. 194.

By *Can. 101.* no faculty or licence shall be granted for solemnization of matrimony, without publication of banns by any person exercising any ecclesiastical jurisdiction, or claiming any privileges in the right of their churches; but only by such as have episcopal authority, or the commissary for faculties, vicars general of the archbishops and bishops, *sede plena*; or, *sede vacante*, the guardian of the spiritualties, or ordinaries exercising of right episcopal jurisdiction in the several jurisdictions respectively.

And by the 26 G. 2. c. 33. § 7. No surrogate deputed by any ecclesiastical judge, who hath power to grant licences of marriage,

shall grant any such licence before he hath taken an oath before the said judge, faithfully to execute his office according to law to the best of his knowledge; and hath given security by his bond in the sum of 100*l.* to the bishop of the diocese, for the due and faithful execution of the said office.

Can. 101. And no licence shall be granted, but to such persons only as be of good quality.

Id. And no licence shall be granted, but upon good caution and security taken.

Can. 102. Which security shall contain these conditions, 1. That at the time of granting such licence there is not any impediment of precontract, consanguinity, affinity, or other lawful cause to hinder the said marriage. 2. That there is not any controversy or suit depending in any court before any ecclesiastical judge touching any contract or marriage of either of the said parties with any other. 3. That they have obtained thereto the express consent of their parents (if they be living), or otherwise, of their guardians or governors. Lastly, That they shall celebrate the said matrimony publicly in the parish church or chapel, where one of them dwelleth; and in no other place; and that, between the hours of eight and twelve in the forenoon.

Can. 103. And for the avoiding of all fraud and collusion in the obtaining of such licences and dispensations; before such licence shall be granted, it shall appear to the judge by the oaths of two sufficient witnesses, (one of them to be known either to the judge himself or to some other person of good reputation then present, and known likewise to the said judge,) that the express consent of the parents, or parent (if one of them be dead), or guardians or guardian of the parties is thereunto had and obtained: and furthermore, that one of the parties shall personally swear that he believeth, that there is no let or impediment of precontract, kindred, or alliance, or of any other lawful cause whatsoever, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony, according to the tenor of the aforesaid licence.

Can. 104. But if both parties who are to marry, being in widowhood, do seek a faculty for the forbearing of banns, then the clauses before mentioned requiring the parents' consents may be omitted; but the parishes, where they dwell, shall both be expressed in the licence, as also the parish named where the marriage shall be celebrated. And if any commissary for faculties, vicars-general, or other the said ordinaries, shall offend in the premises, or any part thereof, he shall, for every time so offending, be suspended from the execution of his office for the space of six months; and every such licence or dispensation shall be held void to all effects and purposes, as if there had never been any such granted; and the parties marrying by virtue thereof, shall be subject to the punishments which are appointed for clandestine marriages.

2 Burn's
E. L. 427.

This clause, saith Dr. Burn, declaring the licence void to all effects and purposes, as if there had never been any such granted, seemeth to render it a matter of great importance, that the aforesaid pre-requisites be strictly observed; for although before the statute

statute of 26 G. 2. only the licence in such case was void, and the parties marrying by virtue thereof were liable to be punished, as for a clandestine marriage; yet, now by that statute, the marriage also will be void, and the other consequences of clandestine marriages will ensue.

By the 5 W. c. 21. § 3. for every skin or piece of vellum or parchment, or sheet or piece of paper, upon which any licence for marriage shall be engrossed or written, shall be paid a stamp duty of 5s.

No licence of marriage shall be granted by any archbishop, bishop, or other ordinary, or person having authority to grant the same, to solemnize any marriage in any other church or chapel than in the parish church or publick chapel of the parish or chapelry, within which the usual place of abode of one of the persons to be married, shall have been for the space of four weeks immediately before the granting of such licence; or, where both, or either, of the parties shall dwell in the extraparochial place, having no church or chapel wherein banns have been usually published, then in the parish church or chapel belonging to some parish, or chapelry, adjoining to such extraparochial place, and in no other place whatsoever.

Provided, that where the marriage is by licence, it shall not be necessary, in support of such marriage, to give any proof that the usual place of abode of one of the parties, for the space of four weeks as aforesaid, was in the parish or chapelry where the marriage was solemnized; nor shall any evidence in such case be received to prove the contrary in any suit touching the validity of such marriage. That is to say, adds Dr. Burn, this shall not avail so as to render the marriage null and void; but nevertheless the surrogate, who granteth such licence contrary to the tenor of this act, seemeth to incur the violation of his oath and forfeiture of his bond given to the spiritual judge, and is liable to be otherwise punished for his contempt of the law.

Also, this shall not extend to deprive the Archbishop of *Canterbury*, and his proper officers, of the right which hath hitherto been used in virtue of the statute of the 25 H. 8. c. 21. of granting special licences to marry at any convenient time or place.

By which statute of 25 H. 8. power is given to the Archbishop of *Canterbury* to grant faculties, dispensations, and licences, as the pope had done before. And by the same statutes, it is enacted, that all children procreated after solemnization of any marriages, to be had by virtue of a licence of dispensation from the Archbishop of *Canterbury*, shall be admitted, reputed, and taken, legitimate in all courts and other places, and inherit the inheritance of their parents and ancestors.

If any person shall falsely make, alter, forge, or counterfeit any such licence of marriage, or cause or procure the same to be done, or assist therein, or utter or publish the same as true, knowing the same to be false, altered, forged, or counterfeited; he shall be guilty of felony without benefit of clergy.

§ 1. In all cases, where banns shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where such banns have been published, and in no other place.

§ 4. And no licence-marriage shall be solemnized in any other church or chapel, than where the usual place of abode of one of the parties hath been for the space of four weeks next before the granting of such licence.

And by *Can. 63.* every minister who shall celebrate marriage between any persons contrary to the canons aforesaid, or any part thereof, under colour of any peculiar liberty or privilege claimed to appertain to certain churches and chapels, shall be suspended for three years by the ordinary of the place where the offence shall be committed; and if any such minister shall afterwards remove from the place, where he hath committed the fault, before he be suspended, then shall the bishop of the diocese, or ordinary of the place where he remaineth, upon certificate, under the hand and seal of the other ordinary from whose jurisdiction he removed, execute that censure upon him.

By a constitution of Archbishop *Reynolds*, matrimony shall be solemnized reverently, and in the face of the church.

And by the words, in the beginning of the office of matrimony, it is supposed to be done in the face of the congregation.

(a) Whether clandestine marriages in Scotland, of English parties, who resort thither to evade the English law, shall be sustained in England, hath been doubted. And very learned men have questioned, notwithstanding that such marriages are valid by the law of Scotland, whether they are effective in England.

By the 26 G. 2. c. 33. § 8. "If any person shall solemnize marriage in any other place than a church or publick chapel, where banns have been usually published, unless by special licence from the Archbishop of *Canterbury*; or shall solemnize matrimony without publication of banns, unless licence be first had from some person having authority to grant the same; every person knowingly and wilfully so offending, and being lawfully convicted thereof, shall be adjudged guilty of felony, and transported for fourteen years;" the prosecution for which felony is by § 9. to be commenced within three years after the offence committed. And by § 8. "All marriages solemnized in any other place than a church or such publick chapel, unless by special licence aforesaid, or that shall be solemnized without publication of banns, or licence of marriage from a person or persons having authority to grant the same first had and obtained, shall be null and void to all intents and purposes whatsoever." But by § 18. it is provided, that this act shall not extend to *Scotland* (a), nor to any marriages among *Quakers* or *Jews*, where both the parties shall be *Quakers* or *Jews*, or to marriages solemnized beyond the seas.

Where parties are bound, by the laws of their own country, to execute any important act or contract with certain solemnities, it is doubted, whether they can elude their own law by going purposely to another country where such solemnities are not essential, and then returning immediately when the act is done. It is a question of publick law; and the most celebrated writers on publick law have holden, that such an act is fraudulent, it is *fraudem facere legi*, which the laws of all nations disallow. In the case of *Robinson v. Bland*, 2 Burr. 1079. which was a security given in France for money there lost at play, wherein the locality of the transaction came in question, there is an *obiter* observation of Lord Mansfield very remarkable. "As to the money won at law, by the rule of the law of England, no action can be maintained for it. To this it has been objected, that the contract was made in France: therefore, the law of France must prevail, and be the rule of determination; by which law, it is alleged, that the money is there recoverable before the marshals of France, who can enforce obedience to their sentences by imprisonment."

"prisonment. I admit that there are many cases, where the law of the place of the transaction shall be the rule; and the law of England is as liberal in this respect, as other laws are. It has been laid down at the bar, that a marriage in a foreign country must be governed by the law of that country where the marriage was had. Which, in general, is true. But the marriages in Scotland of persons going from hence for that purpose, were instanced by way of example. They may come under a very different consideration, according to the opinion of Huberus, p. 33. and other writers. No such case has yet been litigated in England, except one, of a marriage at Offend, which came before Lord Hardwicke, who ordered it to be tried in the ecclesiastical court: but the young man came of age, and the parties were married over again; and so the matter was never brought to a trial." 2 Burn's E. L. 438. But in Buller's Nisi Prius, 113. there is a short note of a case, wherein this point was afterwards determined, upon an appeal to the delegates, viz. Crompton v. Bearcroft, Dec. 1, 1768. The appellant and respondent, both English subjects, and the appellant being under age, ran away without the consent of her guardian, and were married in Scotland; and on a suit brought in the spiritual court to annul the marriage, it was holden, that the marriage was good.

The above act of 26 G. 3. c. 33. § 8. having enacted, That the ceremony shall be solemnized in no other place than a publick church or chapel, *where banns have been usually published*, except by special dispensation from the Archbishop of Canterbury, it was holden, that a marriage, which had been had in a chapel, erected since the act, was invalid. A statute, however, was immediately passed for confirming marriages in such new churches and chapels, with a retrospect, but including the time to come only up to the first of August 1781.

Rex v. Northfield, Dougl. 659.

St. 21 G. 3. c. 53.

By stat. 26 G. 2. c. 33. § 15. all marriages shall be solemnized in the presence of two credible witnesses at the least, besides the minister who shall celebrate the same; and, immediately after the celebration of every marriage, an entry thereof shall be made in the register directed by § 14. to be kept; in which entry it shall be expressed, that the marriage was celebrated by banns or licences; and if both or either of the parties married by licence be under age, with consent of the parents or guardians, as the case shall be; and shall be signed by the minister with his proper addition, and also by the parties married, and attested by such two witnesses.

If the marriage has been regularly solemnized, any subsequent irregularity in the entry shall not affect its validity.

St. Devereux v. Much Dewchurch, Burr. Set. Ca. 506. Bull. N. P. 114. S. C.

The above statute doth not take away the evidence of presumption from cohabitation: though if the evidence be clear, that the marriage was not celebrated according to the requisitions of the act, (as, where in a marriage by licence, one of the parties is under age, and no consent has been had,) it is totally void, and no declaratory sentence in the ecclesiastical court is necessary.]

Rex v. Preston next Feverham, Burr. Set. Ca. 486. 1 Bl. Rep. 192. S. C. Bull. N. P. 114. S. C.

Also, by the (a) 7 & 8 W. 3. c. 35. § 2. it is enacted, "That every parson, vicar, or curate, who shall marry any persons in any church or chapel, exempt or not exempt, or in any other place whatever, without publication of the banns of matrimony between the respective persons according to law, or without licence for the said marriages first had and obtained, shall for every such offence forfeit the sum of one hundred pounds."

(a) For the punishment on gaolers permitting such marriages, vide 10 Ann. c. 19. § 176. And on persons erecting

offices for making insurances on marriages, 10 Ann. c. 26. § 109.

And by § 3. of the said statute, it is enacted, "That every parson, vicar, or curate, who shall substitute or employ, or knowingly and wittingly shall suffer and permit, any other minister to marry any persons in any church or chapel, to such parson, vicar, or curate belonging or appertaining, without publication of banns, or licences of marriage first had and obtained, shall for every such offence forfeit the sum of one hundred pounds: the aforesaid respective forfeitures to be recovered by action of debt, bill, plaint, or information, in any of his Majesty's courts of record, wherein no essoin, wager, or protection of law, or any more than one imparlance shall be allowed; one moiety thereof to his Majesty, his heirs and successors, and the other moiety to him or them who shall inform, or sue for the same."

[It has been determined, that, notwithstanding this statute, the ecclesiastical court is still at liberty to impose spiritual censures upon any person marrying without licence, or publication of banns. *Middleton v. Croft*, 2 Str. 1056. Vin. Abr. tit. Canons, pl. 14. S. C. 2 Atk. 650. S. C.]

And by § 4. of the said statute, it is enacted, "That every man so married without licence, or publication of banns as aforesaid, shall forfeit the sum of ten pounds, to be recovered, together with costs of suit, in manner as aforesaid, by any person who shall inform or sue for the same; and likewise, that every sexton or parish clerk, who shall knowingly or wittingly aid, promote, and assist at such marriages, so celebrated without banns or licences as aforesaid, shall forfeit the sum of five pounds; to be recovered with costs of suit, in manner as aforesaid, by any person who shall inform or sue for the same."

Middleton v. Croft, 2 Str. 1056. Vin. Abr. tit. Canons, pl. 14. S. C. 2 Atk. 650. S. C.]

(D) Of Offences against the Rights of Marriage: And herein,

1. Of the Offence of a forcible Marriage.

BY the 3 H. 7. c. 2. it is enacted in the words following:
 "Where women, as well maidens as widows and wives,
 "having substances, some in goods moveable, and some in lands
 "and tenements, and some being heirs apparent unto their ancestors, for the lucre of such substances, be oftentimes taken
 "by such misdoers contrary to their will, and after married to
 "such misdoers, or to other by their assent, or defiled, to the
 "great displeasure of God, and contrary to the king's laws, and
 "disparagement of the said women, and utter heaviness and discomfort of their friends, and to the evil ensample of all other;
 "it is therefore enacted, That what person or persons from
 "henceforth, that taketh any woman so against her will unlawfully, that is to say, maid, widow, or wife, that such taking,
 "procuring, and abetting the same, and also receiving wittingly
 "the same woman so taken against her will, and knowing the
 "same, be felony; and that such misdoers, takers, and procurators to the same, and receitors knowing the said offence in form
 "aforesaid, be henceforth reputed and judged as principal felons."

“ sons. Provided always, that this act extend not to any person taking any woman only claiming her as his ward, or bondswoman.”

§ 3. and by 39 *Eliz. c. 9.* “ All persons who shall be principals or procurers, or accessories before such offence committed, are excluded from the benefit of the clergy.”

In the construction of the said statute of 3 *H. 7. c. 2.* the following points have been resolved :

That the indictment for this offence must set forth, both that the woman hath lands or goods, or that she was heir apparent, and that the taking was for lucre ; and also that she was married or defiled ; for the enacting clause, in saying, that what person takes any woman *so* against her will, plainly restrains the taking to such as is within the preamble (a) ; but it needs not set forth, that the taking was with an intention to marry or defile.

fol. 463. Swandson's case. (a) Yet these words, *ea intentione ad ipsam maritand.*, are usually inserted in indictments upon this statute ; and it is safest so to do. Hale's Hist. P. C. 660.

It is said in *Hale*, that to make the offence felony within this statute, the taking must be against her will ; but herein, by *Harwkins*, that is no manner of excuse, that the woman at first was taken away with her own consent ; because if she afterwards refuse to continue with the offender, and be forced against her will, she may from that time as properly be said to be taken against her will, as if she had never given any consent at all ; for till the force was put upon her she was in her own power.

That it is not material, whether a woman taken against her will be at last married or defiled with her consent, or not, if she were under the force at the time ; because the offender is in both cases equally within the words of the statute, and shall not be construed to be out of the meaning of it, for having prevailed over the weakness of a woman, whom by so base means he got into his power.

That those who after the fact receive the offender, but not the woman, are not principals within this statute ; because the words are, *receiving wittingly the same woman so taken*, &c., but it seems clearly that they are accessories after the offence, according to the known rules of common law.

That those who are only privy to the marriage, but noways parties to the forcible taking away, or consenting thereto, are not within the statute.

That where a woman is taken by force in the county of *A.* and married in the county of *B.*, the offender may be indicted and found guilty in the county of *B.*, because the continuing of the force there, amounts to a forcible taking within the statute.

It hath been adjudged, as is the constant practice at this day, that on an indictment for a forcible marriage, grounded on this statute, the wife may be a witness against the husband ; for it being by force, it cannot be said a marriage *de jure*, so as to make them one person in law.

freely, without constraint, lived with him, that thus married her, any considerable time, her examination in evidence might be more questionable. Hale's Hist. P. C. 661.

Hob. 182.
Cro. Car.
485.
Dalif. 22.
And. 115.
3 Inst. 68.
Savil, 59.
12 Co. 20.
110. Stat.
Tri. vol. 5.

Hal. Hist.
P. C. 660.
Hawk. P. C.
c. 42. § 5.

Cro. Car.
493.
3 Keb. 193.
Vent. 243.
Browne's
case. 1
Hawk. P. C.
c. 42. § 6.
3 Inst. 61.
Dalif. 22.
St. P. C. 44.
Hal. Hist.
P. C. 661.
1 Hawk.

P. C. c. 42. § 7.

Hal. Hist.
P. C. 660.
1 Hawk.

P. C. c. 42. § 8.

Cro. Car.
448.
Hob. 183.
Hale's Hist.
P. C. 660.

Cro. Car.
488.
Vent. 243.
4 Mod. 8.
4 St. Tr.
455.
But had she

2. Of the Offence of marrying an Infant Female under the Age of sixteen, without Consent of Guardian.

3 Inft. 62.
3 Mod. 84.

By the 4 *Pb. & Mar. c. 8.* it is provided, "That it shall not be lawful for any person to take away any maid, or woman-child unmarried, and within the age of sixteen years, from the parents or guardian in focage, and that if any woman-child or maiden, being above the age of twelve years, and under the age of sixteen, do at any time assent or agree to such person that shall make any contract of matrimony, (contrary to the form of the act,) that then the next of kin of such woman-child, or maid, to whom the inheritance should descend, return, or come, after the decease of the same woman-child, or maid, shall, from the time of such assent and agreement, have, hold, and enjoy all such lands, tenements, and hereditaments, as the said woman-child or maid had in possession, reversion, and remainder at the time of such assent and agreement, during the life of such person that shall so contract matrimony; and after the decease of such person so contracting matrimony, that then the said land, &c. shall descend, revert, remain, and come to such person or persons as they should have done in case this act had never been made; other than him only that so shall contract matrimony."

Hicks v.
Gore,
3 Mod. 84.
Rex v. Corn-
forth, 2 Str.
1162.

[In this statute it hath been resolved, that the marriage must be clandestine, and to the disparagement of the heirs.

That a bastard under the care of her putative father is within the act.

3 Bott. P. L. by Const, 405. pl. 536. S. C.

Rex v.
Moor,
2 Mod. 128.

That the offence is within the jurisdiction of the court of King's Bench.]

2 Lev. 179. S. C. 1 Freem. 444. S. C. 3 Keb. 708. S. C.

3. Of the Offence of procuring an improvident Marriage, and therein of Marriage-Broked Contracts and Agreements.

Lev. 257.
5 Mod. 221.

It is of such consequence, that all marriages should proceed from free choice, and not from any compulsion or sinister means, that it hath been held a matter indictable, or an offence for which the court will grant an information, to procure an improvident or an unequal marriage.

[(a) And this though entered into after marriage. Toth. 27.

And on this foundation, that marriage ought to be free, marriage-broked bonds and contracts have been declared to be void, and decreed to be given up and cancelled (a).]

Show. Par.
Ca. 76.
Hall v. Pat-
ter.

So, though it was decreed in Chancery, that a bond of 1000*l.* penalty, for the payment of 500*l.*, given for procuring a marriage between persons of equal rank, fortune, &c., was good; yet, upon an appeal to the House of Lords, the decree was reversed; for that such bonds to match-makers are of dangerous consequence, and tend to the betraying and ruining persons of fortune and quality, and are not to be countenanced in equity; and that marriage

riage ought to be procured by the mediation of friends and relations; and that such bonds would be of evil example to executors, guardians, trustees, servants, and others who have the care of children.

Nor will the court only decree a marriage-brokage bond to be delivered up, but a gratuity of fifty guineas, actually paid, to be refunded; for that such bargains are in no shape to be countenanced.

[The defendant had a lease made, by *Thomas Thynne*, of the impropriation of *Thame* for two lives in reversion, after another lease for life of Mr. *Thynne* of *Egham*. On the death of Mr. *Thynne* without issue, the estate came to Lord *Weymouth*, who had made a lease, under which the plaintiff claimed. The plaintiff's bill was to set aside the defendant's lease upon surmise, that the consideration of the lease was the defendant's undertaking to procure a marriage between Mr. *Thynne* and Lady *Ogle*. It was objected, that the Lord *Weymouth* being a remainder-man, claimed by settlement paramount, and came not in privity of estate; and therefore neither he nor his lessee were entitled to controvert, whether the lease was made on good consideration or not. But by the court—If the lease was gained by fraud, or an unjust consideration, it is to be deemed void, and the estate to be discharged of it, as if no such lease had been made. An issue was directed to be tried at the bar of the court of Common Pleas, whether the lease was made in consideration of defendant's assisting to effect or procure the said marriage. Two verdicts were given in favour of the defendant, whereupon the bill was dismissed. Upon an appeal to the Lords in Parliament, the decree was reversed, and without regard to the verdicts, the lease was set aside.

"shape; for it cannot be supposed, they set it aside as a marriage-brokage contract upon
1 Vez. 509.

Upon motion for an injunction to restrain the defendant either from bringing an action on a promissory note given by the plaintiff to the defendant in 2000 *l.* for undertaking to procure him a marriage with a lady, or that the defendant may be restrained from assigning it over to any other person, Lord *Hardwicke* said, As it is not only charged by the bill to be a marriage-brokage agreement, but the charge is supported by an affidavit, I will make an order upon the defendant to keep the note in his own possession, and not to assign or indorse it over to any person whomsoever; but I will not extend the injunction so far as to prevent him from proceeding at law.

On a treaty of marriage between *P. B.* and Miss *H.*, then about 20 years old, articles were entered into, to which the intended husband and wife, the defendant, who was the intended wife's servant, and *R. A.* were made parties. The first clause therein was for securing an annuity of 100 *l.* to the defendant out of the wife's estate; but every other provision therein for the benefit of the wife and issue of the marriage was made revocable by the wife, after the marriage should be had. About the same time with the articles, a bond was given by *P. B.* before the marriage to pay the defendant 1000 *l.*, which bond was afterwards delivered up to be cancelled;

Abr. Eq. 90.
Smith v.
Bearing,
2 Vern. 392.

Stribblehill
v. Brett,
2 Vern. 445.
Lord Hard-
wicke,
speaking of
this case,
says, "the
"Lords did
"a very
"extraor-
"dinary
"thing, de-
"termining
"contrary,
"and with-
"out re-
"gard to the
"verdicts.
"They
"must have
"been of
"opinion
"the issues
"were di-
"rected in
"some im-
"proper
"the proofs."

Smith v.
Ayckwell,
3 Atk. 566.
Ambl. 66.
S. C.

Colev. Gib-
son, 1 Vez.
506.

cancelled; but at what particular time did not appear. A recovery was suffered to the use of the articles. And subsequent to the marriage, a new grant was made to the defendant of this annuity; which was continued to be paid for some time after the wife's death. A bill was brought to set it aside; and Lord *Hardwicke* directed three issues: First, Whether the bond was executed in consideration of, or as a premium for, defendant's procuring or assisting plaintiff in his marriage, or on any other, and what consideration? Second, Whether the 1000 *l.* were thereby made payable at or on the marriage, or at any other, and what time? Third, Whether the annuity or rent-charge was granted in consideration of the bond, or procuring or assisting plaintiff in his marriage, or for any other, and what consideration?

Shirley v.
Martin,
Excheq.
14th Nov.

1779. 3 Cox's P. Wms. 74. note.

And as contracts of this kind are avoided on reasons of publick inconvenience, it hath been therefore adjudged, that they will not admit of subsequent confirmation by the party.

Peyton v.
Bladwell,
1 Vern. 240.

So, any private agreement or treaty infringing the open and publick agreement on the marriage, is considered as fraudulent; as, in the following cases: Sir *J. B.* being executor of the plaintiff *Peyton's* mother, and having purchased an estate which belonged to the plaintiff's mother, promised, that he would not only settle such estate upon the plaintiff, but also other lands of 300 *l.* a-year, if a convenient match could be found for the plaintiff. In 1676, Sir *J. B.* treated a marriage for him with the niece of the plaintiffs Sir *J. R.* and *Denham*, and it was agreed between him and Sir *J. R.*, that Sir *J. R.* should give his niece 2500 *l.* portion, to be laid out in lands after his death, and that Sir *J. B.* should settle lands of the value of 300 *l.* a-year, whereof 200 *l.* *per annum* should be settled for the jointure, and that he would also settle other lands of 100 *l.* *per annum* on himself for life, remainder on plaintiff *Peyton* and his heirs. Accordingly, by lease and release, Sir *J. B.*, in consideration of a bond entered into by Sir *J. R.* to pay 2500 *l.* after his and his wife's death for the marriage portion, conveyed lands stated in the deed to be 300 *l.* a-year; and as to 200 *l.* a-year thereof, the same were limited for the jointure of the wife of plaintiff *Peyton*, remainder to the heirs male of their two bodies, remainder to *Peyton* in tail, remainder to him in fee; and as to the residue, to plaintiff *Peyton* in tail, remainder to him in fee. And Sir *J. B.* thereby covenanted, that the jointure lands were 200 *l.* a-year, and that within two years then next he would settle other lands of 100 *l.* a-year, and worth 1700 *l.*, to be sold, to the use of himself for life, remainder to plaintiff *Peyton* in fee. After the marriage, Sir *J. B.* prevailed on plaintiff *Peyton*, who was very young, by promises of leaving him a greater estate by his will than he had promised to settle upon him, and by other insinuations, to execute a writing, whereby Sir *J. B.* was to receive the profits of the whole estate, allowing the plaintiff *Peyton* only 100 *l.* a-year, and to assign over to him Sir *J. R.*'s bond, and also to release and discharge the agreement for 100 *l.* *per annum* on him and his heirs after the death of Sir *J. B.* The plaintiff's bill was to be relieved against these agreements, which had been extorted from the plaintiff

tiff *Peyton*, and to have the jointure made good, the lands settled for the jointure not being of the value of 200*l.* a-year. After long debate, the Lord Keeper decreed, that the defendant *Bladwell*, notwithstanding the agreement with plaintiff *Peyton*, should account for all the profits of the estate which Sir *J. B.* had been in possession of under that agreement, over and above the 120*l.* *per annum*, and the Master was to see what was the value of the jointure lands at the time of the settlement; and the defendant was decreed to make good so much as the jointure lands fell short of 200*l.* *per annum* at the time of the settlement made. And Sir *J. B.* having devised some lands to the plaintiff *Peyton*, the defendant was decreed to make up those lands, and to settle them according to the marriage agreement. And although it was strongly insisted by the defendant's counsel, that the agreement being to settle 100*l.* *per annum* on plaintiff *Peyton* and his heirs, he had power to release and discharge that agreement; and there was no benefit thereby intended to the wife or issue of that marriage; and in case the settlement had been made, it had been in plaintiff *Peyton*'s power to have sold or given away those lands (the settlement being to be made to him and to his heirs after the death of Sir *J. B.*), and therefore he might well release the agreement as to the 100*l.* *per annum*, and no one could be said to be injured by it, any more than if he had devised away or sold those lands; yet the court declared its detestation of such underhand agreements; and that it was a deceit and fraud as to Sir *J. R.*, who was drawn in to give a great portion with his niece, in expectation of a settlement adequate to it, which by this means is to be frustrated: for though plaintiff *Peyton* could have disposed of the lands, which were to have been settled on him and his heirs, yet that is frequently done in many settlements, the father by that means being left at liberty to provide for his younger children, and to reward them most, who behave themselves best: and still there is a benefit intended to the issue of the marriage, and it is part of the consideration for which the portion was given; and therefore they declared this underhand agreement and release to be fraudulent, and set the same aside, and decreed the agreement to be performed, as to the 100*l.* *per annum*.

Upon a treaty for a marriage between *C. R.* and the plaintiff, the plaintiff's father would not consent to the match, by reason that *C. R.* was indebted in the sum of 200*l.* to one *B.*, for which he and his mother stood bound in a bond. To remove this obstruction, *H. R.* (younger brother of *C. R.*) and the mother gave a new bond to *B.* for the payment of this debt; and thereupon the bond in which *C. R.* was bound was given up to be cancelled. But *C. R.* gave his brother *H. R.* a counter-bond to indemnify him against the debt, and paid the interest of the 200*l.* to *B.* during his life. It was in proof, that the plaintiff, the widow of *C. R.*, was privy to all this matter, and that she, being in love with *C. R.*, contrived this way to satisfy her father, that the marriage might take effect: but now being sued by *H. R.* on the counter-bond, as administratrix to her husband, she brought her bill to be relieved.

Lord

Redman v.
Redman,
1 Vern. 348.

Lord Chancellour said, This is a plain fraud, and by this contrivance the father of the plaintiff was drawn in to give the greater portion; and he absolutely refused to marry his daughter, till *C. R.* was made a clear man, and, particularly, discharged of this very debt; and though *H. R.* had no obligation upon him to become bound for his elder brother's debt, yet it was all one to the plaintiff's father which way that debt became discharged; but that was to be first done, let it be one way or other. And his Lordship declared, that in case *C. R.* himself had been the plaintiff, he should have been relieved; but the case was stronger, because if this bond should be suffered to lie on *C. R.*'s estate, it might swallow the assets, and defraud his creditors; as it also injured the plaintiff in the right she had by the custom of *London* to the personal estate of her husband; and therefore he decreed the bond to be delivered up.

Gale v.
Lindo,
2 Vern. 475.

Upon a treaty of marriage between one *G.* and the sister of *W. P.*, the woman not having so great a fortune as the man insisted upon, she prevailed with her brother *W. P.* to let her have 160*l.* to make up her portion, and gave him a bond for the repayment of it, upon which the marriage was had. The husband, who knew nothing of the bond, died without issue, and his wife survived him, and afterwards died, having made her will, and the plaintiff executor. *W. P.*, the brother, dies, and makes the defendant his executor, who put the bond in suit against the plaintiff as executor of the widow, to recover the 160*l.*, and thereupon he brings his bill to be relieved.—For the defendant, it was insisted, that although this might be a fraud, as against the husband or any issue of his, who were to have the benefit of the marriage agreement, yet the husband being dead, and there being no issue, the bond was good against the woman herself, and, by consequence, against her executor, there being no creditors in the case, nor any deficiency of assets pretended. Lord Chancellour.—You admit the husband might have been relieved on a bill brought by him and his wife; that which was once a fraud will be always so; and the accident of the woman's surviving the husband will not better the case. Decreed the bond to be delivered up, and a perpetual injunction against it.

Lamlee v.
Hamman,
2 Vern. 499.

Lamlee the mother having a jointure in part, and 10*l. per annum* devised to her by her husband, and charged upon the other part of the premises in question, on the marriage of *Lamlee* the son, joined in the settlement, and accepted 15*l. per annum* in lieu thereof. The day before the settlement, she had taken a security from her son for 10*l. per annum* out of the leasehold estate, which was not comprised in the marriage settlement, and the son covenanted to pay it. The son died; the plaintiff, his widow, took out administration to him. The defendant brought an action of covenant against her for the non-payment of the 10*l. per annum*. The bill was to be relieved against this action on the ground of fraud; and the court, upon the authority of the above cases, decreed a perpetual injunction.]

An uncle gives his niece by will 1200*l.*, the niece marries, but, antecedent to the marriage, the father takes a bond from the then intended husband to pay him 200*l.* in case the daughter should happen to die without issue male, living her husband: the daughter did die without issue male, living her husband; whereupon the father sued the husband at law upon this bond; and the husband brought his bill in equity to be relieved against the bond, and had a decree accordingly; for it appearing that no money was paid, nor any consideration given for entering into it, the court took it to be in nature of a marriage-broking bond, and therefore ordered it to be delivered up.

Pr. Ch. 267.
2 Eq. Ca.
Abr. tit.
Bonds, &c.
D. pl. 1.
S. C.
2 Vern. 588.
S. C.

[*A.* made an absolute conveyance of lands to *B.* and his heirs, in consideration of 1500*l.*, which sum was at that time the full value. On the next day, *B.* executed a defeasance; declaring, that if *A.* or his heirs should, within 16 years, pay to *B.* the 1500*l.* the conveyance should be void. *B.* entered and enjoyed the lands, and about three years afterwards, upon his marriage, settled them as an absolute estate on his wife and her issue. To this settlement *A.* was privy, but took no notice of the defeasance, or ever attempted to refute the general opinion, that *B.* was the sole and absolute owner of the estate. Upon *B.*'s death, *A.* set up the defeasance, and filed a bill to redeem, to which the son and heir of *B.* pleaded the purchase deeds and his father's marriage settlement. It was in proof, that *A.* made the conveyance to enable *B.* to obtain a marriage and a considerable fortune, though not with the particular lady whom he married. A perpetual injunction was decreed against *A.*, to stop all proceedings under the defeasance.

Webber v. Farmer,
2 Br. P. C. 88. Mr. Viner says, that the decree was affirmed in the House of Lords by eight Lords against seven; Cowper and Harcourt against the decree, and Parker for it: that in a manuscript report of it, said to be Lord

Harcourt's, there is added a note, that the wife's father had notice of the defeasance before the settlement made; a circumstance which is taken notice of in the argument for the appellant in 2 Br. P. C. 90. Vin. Abr. tit. Fraud, H. pl. 3.

On a treaty of marriage between Lord *Arbuthnot*, then a minor, and the daughter of *Morrison*, it was agreed, that *Morrison* should pay 50,000 marks as a portion for his daughter, and a settlement was agreed to be made by Lord *Arbuthnot* and his friends in consideration of that fortune. The night before the execution of the articles, *Morrison* prevailed on Lord *Arbuthnot* privately to sign a writing, purporting that the real agreement was for 40,000 marks only, and that *Morrison* had agreed to the contract for 50,000, upon the express granting of this private obligation, by which Lord *Arbuthnot* bound himself to release *Morrison* from 10,000 marks, part of the 50,000. When Lord *Arbuthnot* came of age, he brought his action to have this obligation reduced, on two grounds, 1. That it was granted by him, whilst a minor, without the consent of his guardians. 2. That it was *contra fidem tabularum nuptialium*, to elicit such a writing clandestinely, contrary to a solemn contract entered into in the presence of his friends. The Lords of Session sustained the reason of reduction, and held the obligation null. Against their decree, *Morrison* appealed to the House of Lords, where it was affirmed with 80*l.* costs.

Morrison v. Arbuthnot,
H. L. 1728.
1 Br. Ch. Rep. 548.
note.

A treaty was entered into between the plaintiff and his son of the one part, and *R. G.* and her uncle of the other part, for the

Pitcairne v. Ogbourne,
2 Vez. 375.

marriage of the plaintiff's son and R. G. The uncle was treated with *in loco parentis*; the intended wife's whole dependance was upon him; she continued to live with him till the time of his death, and she took an ample provision under his will. Upon this treaty an annuity bond was entered into by the plaintiff, by which he stipulated to pay 150*l.* *per annum* to the husband and to the wife, if she survived him. The wife survived the husband. The plaintiff filed his bill to reduce the payment to 100*l.* *per annum*, upon an agreement said to be entered into between the plaintiff, and the husband and wife, but to which the uncle was not privy; whereby, though the bond was to import payment for 150*l.*, yet, for reasons given on the transaction, the actual agreement was declared to be for 100*l.* only. The Master of the Rolls dismissed the bill, considering the private agreement as a fraud upon a material party.

Neville v.
Wilkinson,
7 Br. Ch.
Rep. 543.

Where a bond was entered into by the plaintiff to the defendant before the plaintiff's treaty of marriage, but the defendant, by the plaintiff's desire, upon the occasion of such treaty, misrepresented to the wife's father the amount of the plaintiff's debts, and particularly concealed from him the bond in question; Lord *Thurlow* relieved by injunction against the bond, although it did not appear, that there was any actual stipulation on the part of the wife's father in respect of the amount of the plaintiff's debts.

Key v.
Bradshaw,
2 Vern. 102.

A bill was brought to be relieved against a bond drawn in common form, for payment of money; but proved to be made on an agreement, that the plaintiff should either marry her servant, or should, by way of forfeiture, pay him the sum of money mentioned in the condition of the bond. The court decreed the bond to be delivered up to be cancelled, it being contrary to the nature and design of marriage, which ought to proceed from a free choice, and not from any compulsion.

Montefiori
v. Montefiori,
1 Bl.
Rep. 363.
1 Br. Ch.
Rep. 548.
S. C. cited
by Lord
Thurlow.

Joseph Montefiori, a Jew, being engaged in a marriage treaty; his brother *Moses*, to assist him in his designs, and represent him as a man of fortune, gave him a note for a large sum of money, as the balance of accounts between him and his brother *Joseph*; which balance he (*Moses*) acknowledged to have in his hands; though, in truth, no such balance, or any thing like it, existed. After the marriage had, *Moses* reclaimed this note, as being given on no consideration; and the matter was referred to arbitration. The arbitrators awarded the note to be delivered up, which *Joseph* refused to do; upon which the court was moved for an attachment against him for non-performance of this award; and on his part, a cross motion was made, to set aside the award, on a suggestion, that the arbitrators were mistaken in point of law. Lord *Mansfield*.—The law is, that where, upon proposals of marriage, third persons represent any thing material, in a light different from the truth, even though it be by collusion with the husband, they shall be bound to make good the thing, in the manner in which they represented it. *It shall be*, as represented to be. And the husband alone is entitled to relief, as well as when the fortune, &c. so misrepresented have been specifically settled on the wife: for no man shall

shall set up his own iniquity as a defence, any more than as a cause of action. The arbitrators therefore being clearly mistaken in point of law, the award must be set aside. The rule for the attachment was discharged, and the rule for setting aside the award made absolute.

A mother, who was guardian to her daughter, took a bond from the husband to give her a release of all accounts of the mesne profits of the estate within two years after the marriage. The court held such bond to be of the same nature with a marriage-brokerage bond, and decreed it to be delivered up: for if a bond to give money if such a marriage could be obtained, was ill; by the same reason, a bond to forgive a sum of money must be ill also.

Duke Hamilton v. Lord Mo-hun, 1 Abr. Eq. Ca. 90. 1 P. Wms. 113. S. C. mentions it as a release to be given within two

years after the marriage, in pursuance of a covenant in the marriage-articles, which were made on great deliberation; and that Cowper, C. relieved against this covenant, saying, That to tolerate such an agreement would be paving a way to guardians to sell infants under their wardship. 1 Salk. 158. S. C.

The defendant, who was a taylor by trade, and entitled to a small real estate of about 14*l.* *per annum*, in 1730, made his addresses to the plaintiff, who was then about the age of 26 years, and was the daughter of a man esteemed in the neighbourhood as a man of substance, and who could give her about 500*l.* for her fortune: the courtship had been carried on some time, before it came to her father's knowledge, who, as soon as he was acquainted with it, declared a great dislike of the match, and forbade the plaintiff giving the defendant any encouragement; notwithstanding which, the courtship was carried on in a clandestine manner till January 1732, when the defendant met the plaintiff at a market-town in the neighbourhood, and there, at an alehouse, the following bonds were executed, nobody being present except the witnesses, who were two strangers, and were called in for that purpose, *videlicet*, A bond from the plaintiff in the penalty of 600*l.*, with condition, that "if she did, on or before the expiration of thirteen months after the decease of her father, according to the usage and ceremony of the church of England, espouse and marry the defendant, if the defendant would thereunto assent, and the laws of the realm permit the same, or if it should happen the plaintiff should not, nor would not marry and take to husband the defendant as aforesaid, but should marry with some other person, then the plaintiff should and would well and truly pay, or cause to be paid, unto the defendant the sum of 500*l.* of lawful British money, at or immediately after failure of such marriage; but if it should happen that the plaintiff should die before the time limited and appointed for the said marriage, then the plaintiff should leave and give the defendant 10*l.* as a token of her love, to buy him a suit of mourning with; then the obligation to be void, else, &c."—A bond from the defendant in the like penalty, with condition, that "if he did, on or before the expiration of thirteen months after the decease of the plaintiff's father, according to the usage and ceremony of the church of England, espouse and marry the plaintiff, if

Woodhouse v. Shepley, 2 Atk. 535.

“ the plaintiff should thereunto assent, and the laws of the realm
 “ permit ; or if it should happen the defendant should not, nor
 “ would not marry and take to wife the plaintiff as aforesaid, but
 “ should happen to marry with some other woman, then the de-
 “ fendant did thereby covenant and agree to forfeit, surrender,
 “ and yield up unto the plaintiff for her own use, all his estate real
 “ and personal in *M. and S.*, or elsewhere by sea or land ; but if
 “ it should happen the defendant should die *fore* the time limited
 “ and appointed for the said marriage, then the plaintiff was to
 “ have to her own use one half of all the defendant’s estate, both
 “ real and personal, that he should be possessed of at the time of
 “ his decease ; then the obligation to be void, else, &c.”—An in-
 “ dorsement on the back of defendant’s bond : “ Memorandum,
 “ That before the sealing of this bond, *R. Shepley* doth promise,
 “ covenant, and agree, that he will settle and assure the within-
 “ named *H. Woodhouse* a yearly dower, according to what portion
 “ she shall have, and make her a good assurance as the law di-
 “ recteth, either of lands, money, or living, that shall please her ;
 “ if this said *H. Woodhouse* shall have a child or children, then she
 “ shall have one half of his estate, and the child or children the
 “ other half that he shall die possessed of, or that by any means
 “ belong to him, or his inheritance, that may either fall to him
 “ by sea or land ; and if this said *H. Woodhouse* shall marry this
 “ *R. Shepley*, and have no children by him, then she shall pay to
 “ *Sarah Shepley* 20*l.* of lawful money as a legacy, and then all his
 “ lands, livings, goods, chattels, money, and any thing that shall
 “ ever belong to him, or that ever did in his lifetime, that has not
 “ been received, she shall have and peaceably enjoy, and take for
 “ her own use, and at her own disposing, both in her life and at
 “ her death, unto which I have put my hand. *R. S.*” Upon the
 examination of the witnesses to the bonds, it appeared they differed
 in their accounts of the execution ; one saying, the bonds were
 read over before execution ; the other, that they were not ; one,
 that they were exchanged ; the other, that they both remained in
 the custody of the defendant ; and in fact, at the time the answer
 was put in, they were both in the hands of the defendant. After
 this transaction, the execution of these bonds remained unknown,
 and the intercourse was continued till *May 1736*, when the plain-
 tiff’s father died, who by his will left her a fortune of about 340*l.*
 The thirteen months expired, and then the plaintiff filed the origi-
 nal bill to be relieved against her bond, and dying soon after, the
 cause was revived by her administrator. The cross bill was
 brought by the defendant to have satisfaction of this bond out of
 the assets of *H. Woodhouse*, alleging, he was always ready and
 willing to have married her, but was prevented from having
 any access to her by her brothers. Lord *Hardwicke* refused to
 decree satisfaction of this bond on the cross bill, but directed
 it to be delivered up to be cancelled on the original bill ;
 grounding his decree upon publick and general considerations, the
 encouragement which transactions of this kind, if allowed, would
 give to disobedience, and the *fraud* upon parents.

But

But where a father treated for the marriage of his son; and in the settlement on the son, there was a power reserved to the father to jointure whom he should marry, in 200 *l. per annum*, paying 1000 *l.* to the son; and the father afterwards treating about marrying a second wife, the son agreed with the second wife's relations to release the 1000 *l.*, and actually did release it; but took a bond from the father, without the privity of the second wife's relations, for the payment of this 1000 *l.*; equity refused to set this bond aside, because it would be injurious to the first marriage, which, being prior in time, was to be preferred.]

Roberts v. Roberts, 3 P. Wms. 66.

(E) Marriage how long to continue: And herein of the several Kinds of Divorces; and herein,

1. Of Elopement.

Marriage, for the reasons already given, being to continue during life, a wife can in no (*a*) case whatsoever leave her husband; for in doing it she breaks the most solemn vow, which is made in the presence of God and in the face of the church, that she will cleave to him during life; and therefore, if a woman runs away from her husband, without any (*b*) provocation, he shall not answer for any (*c*) contract she makes, nor be obliged to answer for her necessities.

(*a*) That a wife may have alimony, without any separation. Moor, 874.

(*b*) For if a husband turn away his wife, or

by ill usage oblige her to go away, he gives her credit wherever she goes, and must pay for necessities for her. Salk. 118. pl. 10. 6 Mod. 171. 2 Ld. Raym. 1006. [But in this case, if the wife, whilst she is living apart from her husband, commit adultery, it hath been holden, that the husband is not bound to receive her again, and, consequently, not liable for necessities provided for her subsequent to the time of her being guilty of adultery. Govier v. Hancock, 6 Term Rep. 603.] (*c*) That a court of equity will not assist a wife, who elopes, with alimony.

Also, if a woman elope from her husband, she loses her dower; but it seems, that elopement was no bar of dower at the common law, though a divorce were sued and obtained for the adultery; but now by the statute of *W. 2. c. 34.* it is expressly provided, that in such case the wife shall lose her dower; the words of which are, *si uxor sponte reliquerit virum suum & abierit, & moretur cum adultero suo, amittat in perpetuum actionem petendi dotem suam, quæ ei competere posset de tenementis viri sui. si super hoc convincatur, nisi vir suus sponte & absque coërtione ecclesiæ eam reconciliet, & secum cohabitare permittat, in quo casu restituatur ei actio*; and though she does not go away *sponte*, but is taken against her will, yet if after she consents, and remains with the adulterer, she shall lose her dower; for the remaining with him, without reconciliation, is the bar of dower, not the manner of the going away; and this was the old way of preventing the crime; for they thought it unfit that a wife, who did not share in the labours of the husband, should have any family provision.

2 Inst. 435. Co. Lit. 32, 40. F. N. B. 150. Roll. Abr. 680.

[6 Term Rep. 604.]

In *Dyer*, there is a precedent of such elopement pleaded, and issue taken upon the reconciliation of the husband; but it is there held, that the defendant cannot give in evidence any other elope-

Dyer, 107.

ments than that which is pleaded; for there may be divers elopements, and divers reconciliations, and defendant, at his peril, ought to take issue on one only; that is, as I understand the book, upon the last; for if there be divers reconciliations, yet, if she afterwards elope, the shewing that she was once reconciled after elopement, will not take away what is set up in bar of dower.

Perk. 354.
Brook, 12.
Roll. Abr.
680.
2 Inst. 436.
Co. Lit.
32. b.

If a woman be ravished, and remain with the ravisher against her will, she shall not lose her dower; but, if after such ravishment she consent to remain with him, she shall lose it, though the book thinks the contrary; and in the case cited there, she answered only to the elopement, and not to the remaining with the adulterer: but if she voluntarily go away from her husband, though she remain all her lifetime with the adulterer against her will; or if she remain not with him, but he turn her away, yet shall she lose her dower: but if she be reconciled, as the statute ordains, then she shall be endowed, though the husband hath aliened the land in the mean time.

(a) Perk.
355.
N. N. B.
150. Roll.
Abr. 680.
(b) 2 Inst.
436.

If she elope, and live in adultery in any other the manors or lands of her husband, some (a) books say she shall not lose her dower; either because it cannot be intended a running away from her husband, when she remains in any of his manors or lands; or, because he is to take care that no such live there: But my Lord (b) *Coke* holds the contrary; and says, though she cohabits with her husband in the same house, yet without his reconciliation *sponte*, she shall lose her dower; *a fortiori* in the other case; for the adultery, and the remaining with the adulterer, are the causes of her being barred of dower; and so, though she do cohabit, and be reconciled to her husband, yet if it be by church censures, she shall lose her dower; though (c) *Rolle* says, if she elope, and after live with her husband for some years till his death, by his consent, without compulsion of the church, she shall not be barred of her dower, though it be not averred, that she was reconciled to her husband; which seems reasonable enough, the permission to cohabit with him being an argument and proof of the husband's reconciliation.

(c) Roll.
Abr. 680.

2 Inst. 435.
Roll. Abr.
680. Dyer,
106. b. in
margine.

If a man grants his wife, with her goods, to another, and she lives with the grantee all the lifetime of the husband, yet she shall lose her dower, by reason of her living with him in adultery; and in that case, where such a grant was pleaded, it was held, 1st, That the grant was void. 2^{dly}, That it did not amount to a licence, or, if it did, that it was void. 3^{dly}, That after the elopement, there shall be no averment admitted *quod non fuit adulterium*; though the grantee and the woman married after the husband's death; and though in that case, they brought sentence of purgation of the adultery, from the spiritual court, yet it was not allowed against such presumption.

Roll. Abr.
680. Green
v. Harvey.

If the husband's relations keep him from his wife, so that she does not know what is become of him, and give out that he is dead, and thereupon procure her to release all marriages and interests which she can have in him as her husband, and also persuade her to marry again, which she does, with one who has notice that

that her first husband is alive, but she herself has no notice of it ; though she live in adultery with this man, and though her husband be not out of the realm, nor beyond the seas, so that she ought to have taken notice of his being alive ; yet, because *non reliquit virum sponte*, as the statute says, but by persuasion of his friends, not knowing herself but that he was dead, this is no such elopement as will bar her of her dower.

2. Of the Offence of taking away a Wife, and of criminal Conversation.

At common law, the husband may have an action of trespass *de uxore abductâ cum bonis viri* : also, this offence is prohibited by the statute of *Westm. 2. c. 13.* and a further punishment inflicted than was at the common law ; and by *Westm. 2. c. 34.* it is punishable at the suit of the king, by the words following, *de mulieribus abductis cum bonis virorum suorum habeat rex sectam de bonis sic asportatis.* 2 Inst. 180.
1. 434.
Dyer, 256.
b.

If the wife be *infra annos nobiles*, viz. under the age of twelve years at the time of taking away, some have holden, that the husband shall not have a writ *de uxore abductâ cum bonis viri* ; but my Lord Coke holds the contrary, and that she is *uxor* until disagreement. 47 E. 3.
Action sur
1 Statut. 37.
2 Inst. 435.
cont.

If the wife be taken away, and after be divorced, or if she die, yet the husband shall have his action *de uxore abductâ cum bonis viri* ; for in this action he shall not recover his wife, but damages ; and he cannot have an action for taking her away as his servant, because the law gives him an action in another form. 2 Inst. 434.

Also, it is held, that though the words of the writ be *rapuit*, &c., yet here it is taken for a violent taking away, and not when carnal knowledge is had ; so as this action may be brought against women as well as men. 2 Inst. 435.
Cro. Jac.
538, 539.
that it may
be cepit & abduxit as well as rapuit.

In an action of trespass *de uxore abductâ cum bonis viri sui*, the jury found for the plaintiff, *quoad* taking some goods, but as to all the rest, for the defendant. It was alleged, 1st, That this action concludes *contra formam statuti*, and so the plaintiff makes his case upon the statute, and has failed in proof ; for the verdict is for the defendant, as to the taking away the wife, which is the only matter provided against by any statute. *Sed non allocatur* ; for *per cur.*, if a man brings an action at common law, and concludes *contra formam statuti* generally, it shall not hurt ; but if he recites a statute in particular, and lays the fact to be *contra formam stat. prædict.*, there he must make his case within the statute, else he has failed of his case ; and it has been adjudged, that an indictment of barrettry concluded *contra formam stat.* is good, though there be no statute that is express against it. 2^{dly}, That it does not lay *per quod consortium amisit*. 3^{dly}, That the word *ravish* in *English* implies a carnal knowledge only ; (though in latitude it signifies also a forcible taking away ;) and so the matter amounts to a felony of the plaintiff's own shewing, for which he can have no action of trespass ; Mich.
17 Car. 2.
at Oxford,
in B. R.
Walker v.
Rich. Ent.
1654. in
English.

trespass; but to these the court paid no regard, because they were made immaterial by the verdict.

Cro. Car.
89, 90.
adjudged
and affirmed
in *Cam. Stacc.*

Cro. Jac.
538. S. P.
adjudged.

2 Roll. Abr. 556. Jon. 440. Lit. Rep. 339. 2 Roll. Rep. 51. S. P. adjudged.

Salk. 119.
pl. 12.
6 Mod. 127.
2 Ld. Raym.
1031.
Ruffell v.
Corne.

In trespass and false imprisonment by baron and feme, *per quod negotia domestica* of the husband *remanserunt infecta ad grave damnum ipsorum*; it was objected, that this being laid as a special damage to the husband, the action ought to have been brought by him alone; but adjudged for the plaintiffs after verdict, being only matter in aggravation of damages.

Sid. 387.
Palm. 393.
3 Mod. 120.
2 Ld. Raym.
1032.

In trespass by baron and feme, for beating the feme, they may declare, that it was *ad damnum ipsorum*, notwithstanding a feme covert can have no damages, for this action will survive.

7 Mod. 79.
[Force and
violence
being in
law supposed
to accom-
pany this
atrocious

And as the husband may bring an action for the battery, carrying away and detaining of his wife; so, also, may he have an action against a person for having criminal conversation with her, although the wife consent to the adulterer; for this is a matter in which she cannot assent, by reason of the injury to the husband, and his interest in her.

injury to the husband, the courts, it should seem, proceeded upon this principle, when they formerly held, that the husband's consent, as being to the commission of an unlawful action, was not available as a justification; and that the defendant could not plead in bar, that the fact was by the plaintiff's licence; though it might be given in evidence in mitigation of damages. 12 Mod. 232. But it seems now thought that the husband's privity will defeat the action, though it doth not appear to be any where said, that it is pleadable. Bull. N. P. 27. 4 Term Rep. 651.]

Morris v.
Miller,
4 Burr.
3057.
1 Bl. Rep.
632.
(a) Birt v.
Barlow,
Dougl. 171.
But among

[In this action, it is necessary to bring proof of the actual solemnization of the marriage; cohabitation and reputation are not sufficient, nor is any collateral proof whatever. But a copy of the register (a) is sufficient evidence of the fact of marriage; and the identity of the parties married may be proved by other means, and other persons, besides the minister, clerk, and subscribing witnesses.

some dissenters, marriages are not registered, in which case other proof must necessarily be admitted. *Ibid.* The fact of a marriage may be established by the sentence of a foreign court, having competent jurisdiction, in a suit properly instituted there. 1 Vez. 159.

Howard v.
Burton-
wood, C. B.
Sittings at
Westminst.
Tr. 1776.
Espin. N. P.
343.

In an action for criminal conversation, the marriage was proved by a person who was present when it was solemnized in the *Fleet*, in the year 1737, and the plaintiff's counsel offered to give in evidence the *Fleet* register, as a confirmation of the testimony. *De Grey*, C. J. rejected the evidence, for that the whole of the transaction was illegal, and the register made by a person under no tie, and therefore not entitled to credit.

Woolston v.
Scott, *per*
Deanilton, J.

It has been doubted, whether the ceremony must not be performed according to the rites of the church; but as this is an action

action against a wrong-doer, and not a claim of right, it seems sufficient, if the plaintiff is of any religious sect, to prove the marriage according to the religious form of that sect.

at Thetford, 1753, where plaintiff was an Anabaptist, and recovered 500*l.* Bull. N. P. 28.

The confession of the wife will be no evidence against the defendant; but a discourse between her and the defendant may be proved. So, letters written to her by the defendant may be read as evidence against him, but her letters to him will be no evidence for him.

Baker v. Morley, Guildhall, 1739, Bull. N. P. 28.

In actions of assault, the time of limitation is *four* years; but the criminal conversation, and not the assault, being the gist of this action, not guilty within *six* years is the proper plea to it under the statute of limitations. And upon the same principle, the defendant is entitled to his costs, though the damages should be under forty shillings (*a*).]

Cooke v. Sayer, Bull. N. P. 28.
2 Burr. 753.
(a) Batchelor v. Bigg, 3 Wils. 319.
2 Bl. Rep. 855.
2 Salk. 553.

Also, the husband may not only bring an action at law for the criminal conversation, in which he shall be repaired in damages, but may also proceed in the ecclesiastical court for the adultery and solicitation of chastity; and the proceedings in the one court shall be no bar to the other.

But where there was an indictment for assaulting, beating, wounding, and endeavouring to ravish the wife of *B.*, upon which the party was convicted; and afterwards the husband brought an action of trespass for the same cause; and the party being also libelled against in the spiritual court for the same fact, *viz.* for soliciting her chastity, moved for a prohibition to the proceedings in the spiritual court; though it was urged for the jurisdiction of the spiritual court, that they may punish for the solicitation and incontinence, and that this suit was *pro salute animæ*, the others for fine and damages; yet, a prohibition was granted; for it being an attempt and solicitation to incontinence, coupled with force and violence, it does by reason of the force, which is temporal, become a temporal crime *in toto*; as if one says, *thou art a whore and a thief*, or *thou keepest a bawdy-house*, which are temporal matters, the party shall not proceed in the spiritual court; whereas if it were only, *thou art a whore*, a libel lies in the spiritual court: so, if it be said of a woman, that she is a bawd only, and not that she keeps a bawdy-house. But *per Holt, C. J.* If one commit adultery, and the husband bring assault and battery, this shall not hinder the spiritual court; for it is a criminal proceeding there, and no indictment lies at common law for adultery.

3. Of the several Kinds of Divorces.

Divorces are either such as (*b*) dissolve a *vinculo matrimonii*, and set the parties entirely at liberty, so that they may marry whom they please afterwards; or such as separate a *mensa & thoro*, from bed and board only; in which last the marriage continues in force, so that if either of them marry any other, such marriage is void.

Co. Lit. 235.
a. Cro. Car. 462.
(b) Where such sentence of divorce is given in the spiritual court, the issue shall be perpetually bound, so long as that stands in force; and shall not at common

common law be admitted to make any proof to the contrary. 7 Co. 43. Ken's case. Jenk. 289. Cro. Jac. 186.

47 E. 3. 78. A divorce by reason of (a) precontract * dissolves a *vinculo matrimonii*; for the party being under a prior engagement, the second marriage is null and void, and, consequently, the issue of such second marriage are bastards.

c. 38. No divorce could be for any precontract after marriage solemnized in the face of the church, and consummate with bodily knowledge, or fruit of children; but *quoad* this matter, this was repealed *per* 2 & 3 E. 6. c. 23., and the whole act *per* 1 & 2 Ph. & M. c. 8. § 20., and the 32 H. 8. c. 38. *quoad* so much only as was not repealed by 2 & 3 E. 6. c. 23. was revived *per* 1 Eliz. c. 1. § 11. so that *quoad* this matter, the 32 H. 8. c. 38. stands repealed.—* *Qu.* If since 26 Geo. 2. c. 33. any such divorce can now be had, as no suit or contract of marriage, to compel the same, can be supported in the ecclesiastical courts?

Co. Lit. 235. So, a divorce by reason of consanguinity and affinity dissolves a *vinculo matrimonii*; such marriage being against the divine positive law, and therefore void.

Co. Lit. 235. So, a divorce by reason of frigidity, or impotence, dissolves the marriage absolutely (b), because the end of the contract cannot be answered.

5 Co. 98. But for this kind of divorce, *vide* 5 Co. 9. Moor, 225. 2 Leon. 169. And. 185. Dyer, 178 pl. 40. (b) But if a man be divorced from one woman *propter perpetuam generandi impotentiam*, and then marry another, and have issue by the second marriage, which continues without divorce, the issue are lawful; for a man may be *habilis & inhabilis diversis temporibus*; and the second marriage is not avoided by any divorce, and therefore stands good in law. 5 Co. 98. Bury's case. Noy, 72. Moor, pl. 366. S. C. by the name of Morris v. Webber.

Roll. Abr. 681. A divorce *causâ professionis* is reckoned by some amongst the causes that dissolve the *vinculum matrimonii*, the monks and nuns, by their being professed, having vowed perpetual chastity; but others hold, that in some cases it does not, and that in such the wife shall be endowed; but it is said, this divorce is now taken away by 32 H. 8. c. 38. and other acts, made on purpose to take away that and other scrupulous divorces.

Roll. Abr. 357. And though these kinds of divorces dissolve a *vinculo matrimonii*, yet the issue between the parties are not bastards, till there be a divorce actually had; for though such marriages be unlawful, yet they remain good till sentence of divorce be pronounced; and, consequently, the issue must be esteemed legitimate, till such a dissolution.

Roll. Abr. 681. Co. Lit. 32. a. 33. b. Also, though a divorce *causâ precontractus*, *causâ consanguinitatis*, *causâ affinitatis*, or *causâ frigiditatis*, dissolve the *vinculum matrimonii*, and leave the parties at liberty to marry again; yet, if either of the parties die before such sentence of divorce be actually pronounced, it cannot be pronounced (c) after; and therefore if the husband die before such divorce, the issue are legitimate, and his wife *de facto* shall have dower; for it was *legitimum matrimonium quoad dotem*, and the bishop ought to certify, that they were *legitimo matrimonio copulati*.

not be had after the death of one of the parties, so as to bastardize the issue, yet the spiritual court may proceed to punish the survivor for the incest. Carth. 271. 4 Mod. 182. Salk. 121.

Co. Lit. 32. a. 33. b. 235. Cro. Car 462. 7 Co. 42. Noy, 108. A divorce *propter adulterium* does not dissolve the marriage, but only makes a separation a *mensâ & thoro*; lest married persons should commit the crime in order to dissolve the marriage; and though such a divorce does not bastardize the issue, yet the children

dren born in such a state of separation are *primâ facie* not presumed to be the husband's, unless it can be proved that they cohabited afterwards; but such divorce does not bar the wife of dower (a).

[(a) So laid down as to the point of dower, Tr. 10 E. 3. pl. 24.]

1 Ro. Rep. 426. *arguend.* and Powell v. Weeks, Noy, 108. Godb. 145. S. C. by the name of Lady Stowell's case, 1 R. Abr. tit. Baron and Feme, A. pl. 21. S. C. by the name of Stowel v. Wilkes, and Cro. Car. 463. S. C. cited. But Mr. Hargrave, in note 9, on Co. Litt. 32. a. saith, that according to Rolle's report of this last case, 1 R. Abr. 681., it was adjudged, that the divorce for adultery was a bar of dower. And Lord hurlowe, in the debate in the Houle of Lords upon Shadwell's Divorce Bill, is reported to have said, that in a divorce *a mensâ et thoro* for adultery a woman forfeits her dower. Woodf. Parl. Rep. vol. 11. p. 339. — The reason why a divorce *propter adulterium* does not dissolve the marriage is, that the ecclesiastical court cannot divorce *a vinculo matrimonii* for any cause arising subsequent to the marriage: for if there has been a marriage *de jure*, it is not competent to that court to relcind it. In fact, the sentence of the spiritual court in a divorce *a vinculo matrimonii* is not so properly a dissolution of the contract, as a declaration of its absolute nullity *ab initio*. But the legislature, uncircumscribed in its powers, has frequently for adultery wholly dissolved the conjugal union. It has gone so far too in some cases as to bastardize children born after a certain time prior to the passing of the act, see Wakeman's and Briscoe's Divorce Bills, in 1796; and though it has in general made some provision for the unhappy woman whose criminal conduct has occasioned its interference, yet, where the case has been of a very atrocious nature, it has left her wholly at the mercy of her injured husband. See Shadwell's Divorce Bill, in 1796, and Woodf. Parl. Rep. *ubi supra*. — In the debate which took place upon Mr. Shadwell's Bill, the Lords Thurlowe, Loughborough, and Grenville expressed a wish, that the subject of divorce for adultery were submitted by an enactment of the legislature to some regular judicial court, where the crime and the provocation to the crime would be carefully balanced, where facts and circumstances could be investigated with the temper, the deliberation, the caution, that ought to accompany such an investigation.]

So, a divorce *propter sevitiam* or *metum* is of the same nature, Cro. Car. 462. and does not dissolve the bond of matrimony; but is only a provision for the woman's safety, that she may avoid her husband's cruelty and ill usage.

Master and Servant.

THE relationship between a master and a servant from the superiority and power which it creates on the one hand, and duty, subjection, and, as it were (b), allegiance, on the other, is in many instances applicable to other relationships, which are both in a superior and a subordinate degree; such as lord and bailiff, principal and attorney (c), owners and masters of ships, merchants and factors, and all others having authority to enforce obedience to their orders, from those whose duty it is to obey them, and whose acts, being conformable to their duty and office, are esteemed the acts of their principals. But these being treated of under their proper heads, we shall here consider this relationship, as it more particularly affects masters and those who are more properly called servants and apprentices.

(b) Hence by the Statute 25 E. 3. stat. 5. c. 2. it is petit treason for a servant to kill his master; in the construction whereof it hath been held to extend to a mistress, or master's wife. Plow. 86.

3 Inst. 20. 4 Co. 46. (c) Where a master of a ship is expressly said to be a servant to the owners, and the owners shall answer for him as such. 3 Mod. 323. 2 Vern. 643.

(A) Of the Manner of Hiring and Binding a Person
Servant or Apprentice.

(B) Who may serve, or are capable of binding
themselves Servants or Apprentices.

(C) Of the Jurisdiction of Justices of Peace in
binding out Apprentices, in obliging Masters to
provide for them, in compelling them to refund
the Money had with them, and in discharging
Apprentices from their Masters.

(D) Of the Necessity of serving an Apprenticeship,
as a Qualification to follow a Trade within the
5 *Eliz. c. 4.*: And herein,

1. What shall be said a Trade, which a Person is prohibited
to follow, within the Statute.
2. What Manner of following or exercising a Trade shall be
said within the Statute.
3. What Kind of Service will be a sufficient Qualification
within the Statute.
4. By whom the Offence of following a Trade without a
Qualification is cognizable.
5. Of the Form of the Proceedings in order to a Conviction,
for following a Trade without being qualified.

(E) Of assigning and turning over Apprentices to
other Masters.

(F) Of making Apprentices free.

(G) How Apprentices are to be taken Care of when
their Masters happen to die.

(H) Of Servants' Wages, how recoverable.

(I) What Acts of the Servant are deemed the
Master's, of which the Master may take Ad-
vantage.

(K) What Acts of the Servant shall be deemed the
Master's, for which the Master shall answer and
be bound.

(L) For what Acts of his shall the Servant himself
answer to others.

(M) For

(M) For what Acts of his shall the Servant answer, and be responsible to his Master : And herein,

1. Where by an implied Trust or Confidence a Servant shall answer in a Civil Action.
2. Where Servants and Apprentices shall be punished criminally, for Acts done in relation to their Masters.

(N) Of the Master's Authority over his Servant, and how far he may correct and punish him.

(O) Of the Master's Remedies against others for enticing away, and other Injuries done, in relation to his Servant.

(P) What a Master or Servant may justify doing in each other's Defence.

(A) Of the Manner of Hiring and Binding a Person Servant or Apprentice.

THE retaining a menial servant and taking an apprentice differ greatly as to the manner; for as to the first it may be by parol (a) contract, or agreement only, and therefore such a one may be discharged by parol, and without writing; but an apprentice must be by deed, and cannot be discharged without deed, and must be retained by the name of an apprentice expressly, otherwise he is no apprentice though bound.

21 H. 6. 23.
3 Keb. 304.
6 Mod. 182.
Ld. Raym.
1117.
Salk. 68.
pl. 7.
(a) That by the contract he is confi-

dered as servant, though he has not yet actually done any service for his master. Dalt. Just. c. 58. — And on such contract the master may have an action against him, if he either refuses to serve at all, or departs before the time is expired for which he agreed to serve. Dalt. Just. c. 58. — And where the master has his remedy against another detaining him, *vide infra*, letter (O).

A servant may hire himself for what time he pleases; but it is said, that if a man retain a servant generally, without expressing any time, the law will construe it to be for one year, because that retainer is according to law.

Co. Lit. 42.
b. F. N. B.
168. H.
1 Bl. Com.
425.

Also, it hath been adjudged, that if a person retain a servant for a year, *et sic de anno in annum quamdiu ambabus partibus placuerit*, that, after the second year begun, the retainer holds good for another year; and that it shall not be a retainer for a year certain, and afterwards at will.

2 Keb. 16.
Cotes v.
Sadler.

And as an apprentice can only be bound by deed, so it is necessary, according to the custom of (b) some places, that such deed or indenture be enrolled; as, in *London*, if the indentures be not enrolled before the chamberlain within a year, upon a petition to the

2 Roll.
Rep. 305.
Palm. 361.
Mod. Rep.
271. pl. 22.
(b) Where

persons
binding
them-
selves ap-
prentices to
mariners,
their in-
dentures are
to be en-
rolled in the

the mayor and aldermen, &c. a *scire fac.* shall issue to the master, to shew cause why not enrolled; and if it was through the master's default, the apprentice (a) may sue out his indentures, and be discharged; otherwise, if through the fault of the apprentice; as, if he would not come to present himself before the chamberlain, &c. for they cannot be enrolled, unless the apprentice be in court and acknowledge them.

next corporate towns. 3 Lev. 389. (a) Where it is necessary in order to prove him an apprentice. Skin. 579. pl. 2. And see a certificate relating to the enrolment of apprentices in vol. 3. of Lord Bac. Works, 4to, 353. [By 5 G. 3. c. 46. § 18. the chamberlain, or other proper officer of every city, &c. where any apprentice obtains his freedom by servitude, shall enrol the name of every apprentice, who shall be placed out within such city, the name of the master and mistress, the apprentice fee, the trade, and the dates of the indenture, on pain of twenty pounds. And by § 41. all printed indentures shall have the notice or memorandum described in the act, printed under the same.]

6 Mod. 69.
Salk. 68.
pl. 8.

But it hath been held, that this custom does not extend to one bound apprentice to a waterman, under 21 years of age; for the company of watermen are but a voluntary society, and being free of that does not make one free of *London*.

Smith v.
Birch,
1 Sess. Ca.
222.

[By 5 *Eliz.* c. 4. § 25. an apprenticeship can only be created by INDENTURE: therefore, where the writing by which one person agreed to serve another for seven years began, "THIS INDENTURE" "witnesseth," but was in fact a *deed poll*, and not an indenture, it was holden, that the master could not maintain any action upon it against a person for enticing away and detaining *his* APPRENTICE.

Rex v.
Stratton,
Burr. Sett.
Ca. 272.
Rex v.
Whitchurch
Canonico-
rum,

So, an *agreement* to execute indentures of apprenticeship will not constitute a sufficient binding under 5 *Eliz.* c. 4. although a service of seven years is performed under it; for there must be an *indenture* duly executed: and of course, where there is neither indenture nor agreement, but only a binding by parol, there can be no apprenticeship.

1 Cont't's Bott's P. L. 464. pl. 650. S. P. Rex v. Mannam, Burr. Set. Ca. 290.

Cafe of St.
Savicur's,
Southwark,
1 Cont't's
Bott's P. L.
463. pl. 648.

An indenture, however, though lost, shall be sufficient, on proof being made, that it was duly executed; but a declaration of the mother, that she heard the apprentice's father say, he was bound by indenture, is not sufficient evidence of the fact.

It is provided by 31 G. 2. c. 11. that although the instrument by which the contract is formed should not be indented, the apprentice shall nevertheless gain a settlement under it.

By the several stamp acts, the indenture (except in the case of a parish apprentice) must be stamped with a six shilling stamp, or it cannot be given in evidence.

And by 8 *Ann.* c. 9. § 32. a duty is imposed of sixpence for every twenty shillings for every sum of fifty pounds, or under, and one shilling on all sums above fifty pounds, given, paid, contracted, or agreed for, with, or in relation to every clerk, apprentice, or servant; and proportionably for greater or less sums; which duty shall be paid by the master or mistress.

By § 33. this duty shall be under the management of the commissioners of the stamp office.

By § 35. the monies paid or agreed to be paid with every clerk, apprentice, and servant, shall be truly inserted and written in words at length in the indenture or other writing which contains the covenants, &c. for such service; and such indenture or writing shall bear date upon the day of signing, sealing, or otherwise executing the same, upon pain to every master or mistress of double the sum given, one moiety to the king, and the other to the informer; with full costs to be recovered by action, &c. within one year after the term appointed for the service is expired.

By § 36. the commissioners of the stamp-office are to provide two additional stamps, denoting the *sixpenny* and *shilling* duties; and all indentures, &c. executed in the bills of mortality, shall be stamped at the head stamp-office, and the duties paid to the Receiver-General within one month from the date of the indenture.

By § 37. all such indentures, &c. executed in any other part of *Great Britain* shall, at the option of the party, be sent either to the head stamp-office within the bills of mortality, or to some of the collectors residing without the bills of mortality, within two months after the date of such indentures, and the duties paid thereon: and in case the said payment shall be made immediately to the Receiver-General, the indenture shall be forthwith stamped with one of the new stamps; but, if made to the collector, he shall indorse on such indenture a receipt for the monies so paid in words at length, bearing date the day on which such payment shall be made, and subscribe his name thereto, and then deliver back the indenture to the bringer thereof.

By § 38. the indenture, &c. so indorsed, if made within fifty miles from the bills of mortality, shall, within three months after the date thereof, be brought or sent to the stamp-office in *London*, and immediately stamped, as the case shall require.

By § 39. all indentures, &c. wherein shall not be truly inserted the full sum received with such apprentice, &c., or which shall not be stamped according to the tenor of this act, within the time limited, shall be void, and not available in any court; and the apprentice be incapable of being free of any city, &c., or of following the intended trade.

But by § 40. this act shall not extend to apprentices put out at the common publick charge of any parish.

By § 43. no indenture required by this act to be stamped, shall be given in evidence in any suit brought by the parties, unless the party producing it do first make an oath, that the sums inserted were all that were paid on behalf of the apprentice.

And by § 45. where any thing, not being money, shall be given, &c. to any master or mistress with any apprentice for whom a duty is chargeable by this act, the duty shall be paid to the full value of the thing given.

By 9 *Ann. c. 21.* § 66. if any master or mistress shall neglect to pay the rates or duties, they shall forfeit fifty pounds, one moiety to the king, the other to him who shall sue for the same, &c.

Cuerden v.
Leland,
1 Bott's
P. L. 483.
pl. 679.

If a person agrees to go apprentice to another, and enters upon the service accordingly, and after a trial of three months is bound apprentice by indenture, but the indentures are dated at the time he entered on the service, and not at the time of the execution, the indentures are absolutely void to all intents and purposes, by 8 Ann. c. 9. § 35.

Id. ibid.

So also, where a mother bound her son apprentice, and paid twenty shillings to the master, which sum was recited in the indenture pursuant to 8 Ann. c. 9. § 45. but the sixpence duty was never paid, nor the indentures stamped with the additional stamp, they were held void.

Rex v.
Lanvari
Dyffryn

So also, if on production of the indentures, they are not stamped though the duty paid.

Clwyd, Burr. Set. Ca. 236. Rex v. Ditchingham, 4 Bur. Set. Ca. 4 Term Rep. 769.

Rex v.
Highnam,
1 Conft's
Bott's P. L.
495. pl. 689.

So, an agreement of apprenticeship, entered into with a view to save the expences of indentures, and to avoid the payment of the duties imposed by the above statute of 8 Anne, is void and of no effect.

Rex v. East
Knoyle,
Burr. Set.
Ca. 151.

But, in cases where the indenture is not produced, and evidence is given that indentures actually existed, and were duly executed, the court will presume that they were regularly stamped, and the duty paid.

Rex v.
Badly,
1 Conft's
Bott's P. L.
490. pl. 687.

But, before parol evidence is given of the contents of indentures, proof must be made of their being lost; and it seems, that some evidence ought to be given, not only that they were duly executed, but that the duty was paid.

Rex v.
Northow-
ram, 2 Str.
1132. Rex
v. St. Pe-
ter's, Chef-
ter, 1 Conft's
Bott's P. L.
486. pl. 682.
S. P. Rex
v. St. Pe-
trox, in
Dartmouth,
4 Term Rep.
196. S. P.

The additional stamp is only required, where the money, or other thing, is given, paid, contracted, or agreed for, with, or in relation to, the apprentice; and therefore, when the mother of a lad proposed to put him out an apprentice, but the intended master refused to take him, because he wanted clothes, and the grandfather agreed to give the master thirty shillings, which the master was to, and did, lay out for the boy in clothes, the court held, that there was not any stamp necessary on this account; for the statute means money given for the benefit of the master; and, in this case, he laid out the money merely as an agent to the boy's friends.

Baxter v.
Faulam,
1 Wils. 129.
Rex v. Yar-
mouth,
Burr. Sett.
Ca. 379.
S. P.

So, where in an indenture sixpence was the sum mentioned to have been given to the master, as a fee with the apprentice; the court resolved, that the statute intended, that when more than fifty pounds was paid, a twentieth part thereof should be paid for duty, and a fortieth part when the sum was under fifty pounds; but that in the present case, there would not, under this mode of calculation, be any coin small enough to pay the duty in; and *de minimis non curat lex*.

Pennington
v. Sudal,
1 Conft's
Bott's P. L.
488. pl. 686.

So also, where in indentures of apprenticeship, there was a covenant, that the father would provide the apprentice meat, drink, washing, lodging, and clothes, and that the master should pay the apprentice five pounds a-year in consideration of his faithful services and of the due performance of the covenants; the court

court seemed to think, that the indentures did not require a stamp under the statute of 8 *Anne*.

But this point was afterwards more solemnly decided. Thus, where it was agreed in the indentures, that "sufficient meat, drink, apparel of all kinds, physick, surgery, and lodging, and all other necessaries during the term, should be found and provided for the apprentice by the father, for which purpose the master was to allow him four shillings a-week during the term;" the court held the indentures good, although they were not stamped, and no duty paid.

Rex v. Portsea, Burr. Sett. Ca. 834.

So also, where in an indenture the apprentice covenanted, that he would at his own expence provide for himself meat, drink, washing, lodging, apparel, and physick, at all times during the term; and the master covenanted to pay him five shillings a-week for the first three years, and seven shillings a-week for the remainder of the term;" it was ruled, that the indenture did not require the additional stamps imposed by 8 *Anne*.

Rex v. Walton Dale, 3 Term Rep. 515.

And where an indenture was, that the father of the apprentice would, at his own charge, find and provide for his own son good, competent, and sufficient meat, drink, and lodging, every *Sunday* in the year during the term; and would provide him with clothes and apparel of all sorts (except working aprons and shoes); and the master covenanted to provide him with meat, drink, and lodging, except on *Sundays*, during the term; the court thought the point so clearly settled, that they would not suffer it to be argued.

Rex v. Leighton, 4 Term Rep. 732.

So also, money given by parish officers (in the case of a voluntary binding), as the consideration of the pauper's being taken apprentice, is not liable to the duty imposed by the 8 *Anne*; for it comes within the exception of § 40. as being at the publick charge of the parish.

Rex v. St. Petrox, in Dartmouth, 4 Term Rep. 196.

By 18 G. 2. c. 22. § 24. if any master or mistress neglect to pay the rates and duties within the respective times limited by 8 *Ann. c. 9.* and 9 *Ann. c. 21.* they shall further forfeit for every neglect double the rates and duties charged.

By 18 G. 2. c. 22. § 25. if any apprentice, &c. on the neglect of his master or mistress to pay the rates and duties, shall, on notice to his master or mistress, pay the said rates and duties, and also the penalties and forfeitures of this act, within one year after the same became incurred, such apprentice may, within three months afterwards, demand back the apprentice-fee; and if the same be not paid within three months after such demand, he may recover the same by action, and shall be discharged from his apprenticeship.

And by § 26. such apprentice shall have the same benefit of the time he shall have served, as he could have had in case of any assignment or turning-over to any new master or mistress.

By 20 G. 2. c. 45. § 5. if any master or mistress, who shall become liable to the double duties, shall pay them to the persons who ought to receive them; and also tender the indentures to be stamped at any time within two years after the end of the apprenticeship,

ticeship, and before any suit for them is commenced, the indentures shall be good and available in law and equity, and the apprentice as capable of following his trade, as if the single duties had been regularly paid.

By § 6. if any apprentice shall, after such double duties incurred, make request in writing before one witness, to his master or mistress to pay them, and shall, on the neglect of his master or mistress to pay the said double duties within three months after such request, pay the same at any time within two years after the determination of his apprenticeship, he may, within three months after such payment, demand of his master or mistress double the apprentice-fee; and if the same be not paid within three months after such demand, he may recover the same by action, and shall, immediately after such payment, and upon signifying by writing under his hand, that he desires to be discharged from his apprenticeship, be discharged from the same.

And by § 7. he shall have the same benefit of the time served, as if he had been assigned or turned over.

But by § 8. if, where any prosecution shall be commenced against any master or mistress for penalties, the apprentice shall pay such double duties within two years after his apprenticeship expires, the indenture shall be good, &c.]

(B) Who may serve, or are capable of binding themselves Servants or Apprentices.

Dalt. c. 58. **I**T is said, that if a married man and his wife bind themselves to serve, they shall be compelled thereto, according to their covenant or agreement; and that if a woman who is a servant shall marry, yet she must serve out her time; and her husband cannot take her out of her master's service.

11 Co. 89. b. It seems clearly agreed, that by the (a) common law, infants, or
2 Inst. 379, persons under the age of 21 years, cannot bind themselves appren-
380. tices, in such a manner as to entitle their masters to an action of
3 Leon. 63. covenant, or other action, for departing their service, or other
7 Mod. 15. breaches of their indentures; which makes it necessary, according
[8 Mod. 190. to the usual practice, to get some of their friends to be bound for
Dougl. 518.] the faithful discharge of their offices, according to the terms
(a) Nor in agreed on.
equity. Abr.
Eq. 6.—
But if an

infant of five years of age, or other person who is not *potens in corpore*, be retained, and serve in the best manner he can, his master must pay him his wages. Bro. tit. Labour, 46. Dalt. Just. c. 58.

But by the 5 Eliz. c. 4. § 43. it is enacted in the words following: "And because there hath been, and is some question and
"scruple moved, whether any person being within the age of
"twenty-one years, and bounden to serve as an apprentice, in
"any other place than in the said city of London, shall be bound-
"en, accepted, and taken as an apprentice; for the resolution of
"the said scruple and doubt, be it enacted by the authority of this
"present

" present parliament, That all and every such person or persons, that at any time or times from henceforth shall be bounden by indenture to serve as an apprentice in any art, science, occupation or labour, according to the tenour of this estatute, and in manner and form aforesaid, albeit the same apprentice, or any of them, shall be within the age of twenty-one years, at the time of making their severall indentures, shall be bounden to serve for the years in their severall indentures contained, as amply and largely to every intent, as if the same apprentices were of full age at the time of making such indentures; any law, &c."

But notwithstanding this statute, it hath been held, in an action of covenant against an apprentice, for departing from his master's service without licence, within the time of his apprenticeship; where the defendant pleaded, that at the time of making the indenture he was within age; and on demurrer to this plea, it was argued, that this indenture should bind the infant, because it was for his advantage to be bound apprentice, to be instructed in a trade; and it was also urged, that he was compellable by the 5 *Eliz. c. 4. supra*, to be bound out an apprentice; that although an infant may voluntarily bind himself an apprentice, and if he continue an apprentice for seven years, he may have the benefit to use his trade; yet neither at the common law, nor by any words of the above-mentioned statute, a covenant or obligation of an infant, for his apprenticeship, shall bind him; but if he misbehave himself, the master may correct him in his service, or complain to a justice of peace, to have him punished according to the statute; but no remedy lieth against an infant upon such covenant.

By the custom of *London*, an infant unmarried, and above the age of fourteen, may bind himself apprentice to a freeman of *London*, by indenture with proper covenants; which covenants, by the custom of *London*, shall be as (a) binding as if he was of full age.

(a) And for a breach an action may be brought in any other court, as well as in the courts of the city. Moor, 136.

[Although an infant cannot bind himself apprentice so as to entitle his master to an action of covenant for breach of any of the clauses in the indenture, yet it should seem (but the point has never been directly determined,) that if in fact he does bind himself, he is not afterwards at liberty to avoid a contract so notoriously for his benefit.

Hardw. 323. S. C. Rex v. Evered, Cald. 26. Rex v. Hindringham, 6 Term Rep. 557. Bertles, id. 652.

It has been determined, that an indenture of apprenticeship to an infant is not void, but only voidable.]

Dartmouth, 4 Term Rep. 196.

Cro. Car.
179. Gybert
v. Fletcher.
Cro. Jac.
494. S. P.
[Whitby v.
Loftus,
8 Mod. 459.
S. P. Brand
v. Ewington,
Doug. 518.
S. P.]

Moor, 134.
2 Bullst. 192.
2 Roll.
Rep. 305.
Palm. 361.
Mod. 271.
2 Keb. 687.

St. Nicholas
and St. Peter,
in Ipswich, 2 Str.
1066. Burr.
Sett. Ca. 94.
S. C.
Ca. temp.

Affcroft v.

Rex v. Petron, in

(C) Of the Jurisdiction of Justices of Peace in binding out Apprentices, in obliging Masters to provide for them, in compelling them to refund the Money had with them, and in discharging Apprentices from their Masters.

THE jurisdiction of justices of the peace herein depends on divers acts of parliament, particularly on the 5 *Eliz. c. 4.* the most material clause of which, as to this purpose, is § 35. which is as followeth: “That if any person shall be required by any householder, having and using half a plough-land, at the least, in tillage, to be an apprentice, and to serve in husbandry, or in any other kind of art, mystery, or science, before expressed, and shall refuse so to do; that then, upon complaint of such housekeeper, made to one justice of the peace of the county where the said refusal is, or shall be made, or of such householder inhabiting in any city, town corporate, or market-town, to the mayor, bailiffs, or head officer of the said city, town corporate, or market-town, if any such refusal shall be there, they shall have full power and authority, by virtue hereof, to send for the same person so refusing; and if the justice, or the said mayor or head officer, shall think the said person meet and convenient to serve as an apprentice in that art, labour, science, or mystery, wherein he shall be so then required to serve, that then the said justice, or the said mayor, or head officer, shall have power and authority, by virtue hereof, if the said person refuse to be bound as an apprentice, to commit him unto ward, there to remain until he be contented, and will be bounden to serve as an apprentice should serve, according to the true intent and meaning of this present act; and if any such master shall misuse or evil entreat his apprentice, or the said apprentice shall have any just cause to complain, or the apprentice do not his duty to his master; then the said master, or apprentice, being grieved, and having cause to complain, shall repair unto one justice of peace within the said county, or to the mayor, or other head officer of the said city, town corporate, market-town, or other place, where the said master dwelleth, who shall, by his wisdom and discretion, take such order and direction between the said master and his apprentice, as the equity of the cause shall require; and if for want of good conformity in the master, the said justice of peace, or the said mayor or head officer, cannot compound and agree the matter between him and his apprentice, then the said justice, or the said mayor, or other head officer, shall take bond of the said master to appear at the next sessions then to be holden in the said county, or within the said city, town corporate, or market-town, if the said master dwell within any such; and upon his appearance, and hearing of the matter, before the said justices, or the said mayor, or other head officer, if it be

“thought

“ thought meet unto them to discharge the said apprentice of his
 “ apprenticeship, that then the said justices, or four of them at
 “ the least, whereof one of them to be of the *quorum*, or the said
 “ mayor, or other head officer, with the consent of three other of
 “ his brethren, or men of best reputation within the said city,
 “ town corporate, or market-town, shall have power, by authority
 “ hereof, in writing under their hands and seals, to pronounce
 “ and declare that they have discharged the said apprentice of his
 “ apprenticeship, and the cause thereof; and the said writing,
 “ so being made and enrolled by the clerk of the peace, or town-
 “ clerk, amongst the records that he keepeth, shall be a sufficient
 “ discharge for the said apprentice against his master, his execu-
 “ tors and administrators; the indenture of the said apprentice-
 “ hood, or any law or custom to the contrary notwithstanding;
 “ and if the default shall be found to be in the apprentice, then
 “ the said justices, or the said mayor, or other head officer, with
 “ the assistance aforesaid, shall cause such due correction and
 “ punishment to be ministered unto him, as by their wisdom and
 “ discretion shall be thought meet.

“ *Provided*, That no person shall by force or colour of this
 “ statute be bounden to enter into any apprenticeship, other than
 “ such as be under the age of twenty-one years.”

[By § 47. justices are authorized to grant warrants to apprehend
 apprentices or servants, who shall abscond from service, and to
 imprison them, until they demean themselves properly.

An apprentice apprehended under this act, and had

cannot object, in his defence, that he had been bound contrary to the directions of the
 therefore run away to avoid the indentures. Rex v. Evered, Cald. 26.

By 20 G. 2. c. 19. § 3. “ any two justices where the master
 “ dwells, may, upon complaint of any parish apprentice, or of
 “ any other apprentice upon whose binding no larger a sum than
 “ five pounds was paid, summon such master and examine the
 “ case, and upon proof on oath of the fact alleged, may, whether
 “ the master be present or not, if the service of the summons be
 “ proved, discharge such apprentice by a certificate under their
 “ hands and seals. And by § 4. the two justices, upon complaint
 “ by the master on oath, may examine the same, and commit the
 “ apprentice to the house of correction to hard labour for any
 “ time not exceeding a calendar month (a), or may discharge
 “ such apprentice as aforesaid.” By § 5. “ Persons grieved may
 “ appeal to the next general quarter sessions, where the matter
 “ shall be finally determined, and such costs paid to the appellant
 “ or respondent as the sessions shall think reasonable, not exceed-
 “ ing forty shillings.”

(a) Enlarged to three months by 32 Geo. 3. c. 57. § 13.

By 6 G. 3. c. 25. “ If any apprentice, except such with whom
 “ the sum of ten pounds was paid, shall absent himself during
 “ the term, he shall serve for so long a time as he shall absent
 “ himself over and beyond the term of his apprenticeship, unless
 “ he shall make satisfaction to his master for the loss he shall have
 “ sustained by his absence; and if he refuse so to do, one justice,
 “ on complaint of the master, may apprehend such apprentice,

"and on hearing the complaint, determine the satisfaction that shall be made; and if the apprentice do not conform to such determination, the justice may commit him to the house of correction for any time not exceeding three months." By § 3. "the application of the master to compel satisfaction for absence as aforesaid, must be made within seven years next after the expiration of the term of apprenticeship." And by § 5. "the party grieved may appeal to the next general quarter sessions, on giving six days notice of his intention to bring such appeal, and of the cause and motive thereof, to such justice, and entering into a recognizance within three days after such notice, to try such appeal; and the sessions shall finally determine the same, and award costs." But by § 6. "neither the stannaries, nor the jurisdiction of the chamberlain, nor any other court within the city, shall be affected by this act."]

Skin. 108.

pl. 7.

5 Mod. 139.

2 Salk. 471.

pl. 4.

(a) The order of discharge need not be mutual; therefore if they

order that the servant shall be discharged from his master, they need not discharge the master from his covenants; for when the servant is discharged, the other is no longer master. 5 Mod. 139. 2 Salk. 471. pl. 4. (b) A person, after three years service, plainly appearing to be a natural idiot, discharged, and order affirmed. Skin. 114. — That by the custom of London, a freeman may turn away his apprentice for gaming. 2 Vern. 291. — But if an apprentice marries without the privity of his master, yet that will not justify his turning him away, but he must take his remedy on his covenant. 2 Vern. 492. [Nor can he send him away on account of his being sick, or so lame as to be unable to work, or having the king's evil to such a degree as to be deemed incurable. Rex v. Hales-Owen, 1 Str. 99. Neither can the sessions discharge an apprentice on general allegations of unkind usage by the master, and the declaration of the master that he will not take his apprentice again; for by 5 Eliz. c. 4. § 35. the particular cause of the discharge must be stated in the order. Rex v. Davis, 2 Str. 704. Rex v. Heafemar, Ca. temp. Hardw. 101. 2 Str. 1014. S. C. But a neglect on the part of the master to instruct his apprentice in the mysteries of that trade he was bound to learn, is a sufficient cause of discharge. Rex v. Amies, 1 Const's Bott's P. L. 515. pl. 731. (c) But the contrary is now settled, Rex v. Amies, *ubi supra*. Rex v. Collingburne, 1 Str. 663.]

Carth. 366.

5 Mod. 138.

2 Salk. 471.

pl. 4. Case

of Set. &

Rem. 20.

pl. 29.

The King

v. Gately.

Therefore, where an order of sessions was made to discharge a surgeon's apprentice from his master, for not instructing him in the art of surgery; but the master being a *mountebank* kept the apprentice for a tumbler on the stage; the order was quashed for want of jurisdiction in the justices, because a surgeon is not one of the trades mentioned in the 5 Eliz. c. 4. and, there, it was held, that the justices have power only over such apprentices who are bound to the trades therein named, and not over apprentices to other trades.

Saund. 314.

Hawke-

worth and

Hillars,

Salk. 67.

pl. 3. Skin.

108. pl. 7.

(d) Where

And yet it hath been resolved, that the justices may not only discharge a merchant's apprentice, (which has been agreed not to be a trade within the statute 5 Eliz. c. 4.) but also oblige the master to refund part of the money which he had with him. And this doctrine of refunding seems to be now established, as founded on (d) great reason, though not expressly mentioned in the act;

act; for the justices being authorized to discharge according to their discretions, when the end of the apprenticeship cannot be attained with one person, it is but justice the master should return part of the money he has received with his apprentice, to place him out with a new master.

Vern. 46. pl. 2. Vern. 64. pl. 57. 492. Atk. Rep. 149. pl. 89.

a court of equity will oblige a master to refund. Finch's Rep. 396.

It hath been held, that an order on the master to return money is good, though it is not averred that he had any with the apprentice, for the order being to return money, is as necessary a proof of the receipt of it, as if it had been expressly alleged. And in this case the court seemed to be of opinion, that though the justices had jurisdiction as to discharging and obliging the master to refund, as well in other trades as those mentioned in the statute; that they are not obliged in their orders to set forth all the steps they take in their proceedings, there being nothing in the act which makes it necessary, and that there was a known and established distinction between orders and convictions.

in Rex v. Vandeleer, 1 Str. 69., justices cannot order monies to be returned on discharge of an apprentice.]

The King v. Amies, 2 Barnard. K. B. 244. 296. S. C. Sef. Caf. 190. pl. 170. S. C. 1 Conft's Bott's P. L. 515. pl. 73. S. C. 2 Kel. 128. pl. 104. S. C. [But

It hath formerly been held, that the sessions cannot make an original order of discharge; but that, according to the statute, the parties ought first to apply themselves to a justice of peace; and if he cannot compound the matter, then he is to bind the master to appear at the next sessions. But it hath been ruled of (a) late, and seems now established, that an order on an original application is good, and that the previous application to one justice is only discretionary.

Sand. 316. Carth. 198. Salk. 68. pl. 6. 5 Mod. 138. (a) So ruled in the case of the King v. Amies. Trin. 7 G. 2. 2 Barnard.

K. B. 244. 279. 2 Kel. 128. pl. 104. 296. Rex v. Gill, 1 Str. 143. Rex v. Davies, id. 704.

If the master, being bound to answer at the sessions, does not appear, it is a forfeiture of his recognizance; but yet at the same time the (b) justices may proceed to make an order against him.

The statute says the discharge must be made on the appearance of the master, yet it must have a reasonable construction, so as not to permit the master to take advantage of his own obstinacy. 2 Salk. 490. pl. 53. [But the master must be summoned. Watkins v. Edwards, 1 Mod. 286. And it must appear on the face of the order, that the master either appeared, or was summoned. Reg. v. Rutter, 1 Conft's Bott's P. L. 513. pl. 723. Rex v. Gill, 1 Str. 143. But it is said, that although there must be a summons, it need not be set forth in the order; nor need the order state, that the master was heard; for that summons and default is equal to appearance, Rex v. Amies, 1 Conft's Bott's P. L. 515. pl. 731. But *qu.* of this opinion, for the statute expressly requires appearance, and Lord Hardwicke quashed an order, because it did not appear on the face of it, that the master had appeared or made default. Rex v. Heafeman, Ca. temp. ardw. 101.]

Salk. 67. pl. 3. (b) For though the 2 Salk. 490. Reg. v. Rutter, 1 Conft's Bott's P. L. 513. pl. 723. Rex v. Gill, 1 Str. 143. But it is said, that although there must be a summons, it need not be set forth in the order; nor need the order state, that the master was heard; for that summons and default is equal to appearance, Rex v. Amies, 1 Conft's Bott's P. L. 515. pl. 731. But *qu.* of this opinion, for the statute expressly requires appearance, and Lord Hardwicke quashed an order, because it did not appear on the face of it, that the master had appeared or made default. Rex v. Heafeman, Ca. temp. ardw. 101.] Sand. 316. Carth. 199. Comb. 344. (c) 2 Salk. 470. pl. 2.

The order of discharge must be under the hands and seals of the four justices, according to the express appointment of the statute; but it is (c) said, that in a *certiorari* to remove the order, it is sufficient in the return to take notice of the order so made, for it is not necessary to certify the discharge itself.

[The order must state the reason of the judgment; for the statute requires the sessions to express the cause of the discharge.

Rex v. Heafeman, Ca. temp. Hardw. 105.

Rex v.
Hales-Owen, 1 Str. 99. It must also be enrolled among the records of the sessions.

Rex v. Col-
lingburne,
1 Str. 663. The sessions of the place where the parties *live* have jurisdiction on this subject; and therefore, where *A.* was bound and enrolled apprentice to a freeman in *London*, but lived with his master in the county of *Middlesex*, it was holden, that the sessions of the county have a concurrent jurisdiction with the sessions of the city, and may discharge the apprentice in *Middlesex* for causes arising in *London*.]

[(a) Butby
18 Geo. 3.
c. 4. "the
apprentice-
ship of a
male child
put out pur-
suant to the
43 Eliz.
shall be for
no longer
term than
till such child
shall come to the age of twenty-one years."]

By the 43 *Eliz. c. 2. § 5.* it is enacted, "That it shall be law-
ful for the churchwardens and overseers of the poor, or the
greater part of them, by the assent of any two justices of the
peace, to bind poor children apprentices, where they shall see
convenient, till such man-child shall come to the age of twenty-
four years, (a) and such woman-child to the age of twenty-one
years, or the time of her marriage; the same to be as effectual
to all purposes, as if such child were of full age, and by indent-
ure of covenant bound him or herself."

By the 1 *Jac. c. 25. § 23.* 21 *Jac. c. 28.* 3 *Car. c. 4. § 22.*
this last-mentioned act is continued, with this further addition,
"That all persons, to whom the overseers of the poor shall, accord-
ing to this act, bind any children apprentices, may take and re-
ceive and keep them as apprentices; any former statute to the
contrary notwithstanding."

By the 8 & 9 *W. 3. c. 30.* reciting, That whereas by an act made in the 43 *Eliz. c. 2. § 5.* it is, among other things, enacted,
That it shall be lawful for the churchwardens and overseers of the
poor of any parish, or the greater part of them, by the assent of
two justices of the peace, whereof one to be of the *quorum*, to bind
poor children apprentices where they shall see convenient; but
there being doubts, whether the persons, to whom such children
are to be bound, are compellable to receive such children as ap-
prentices, that law hath failed of its due execution; therefore it is
enacted and declared, "That where any poor children shall be

[By 20 G. 3.
c. 36. the
same provi-
sions are en-
acted with
respect to
poor persons
put out ap-
prentices in
any particu-
lar district
of England
by virtue of
any private
act of parli-
ament for
the regulat-
ing and or-
dering of the
poor.]

"appointed to be bound apprentices pursuant to the said act, the
person or persons, to whom they are so appointed to be bound,
shall receive and provide for them, according to the indenture
signed and confirmed by the two justices of the peace, and also
execute the other part of the said indentures; and if he or she
shall refuse so to do, oath being thereof made by one of the
churchwardens or overseers of the poor, before any two of the
justices of the peace for that county, liberty, or riding, he or she
shall for every such offence forfeit the sum of 10*l.* to be levied
by distress; the same to be applied to the use of the poor of
that parish or place where such offence was committed; saving
always to the person to whom any poor child shall be appointed
to be bound an apprentice, as aforesaid, if he or she shall think
themselves aggrieved thereby, his or her appeal to the next
general

“ general or quarter-sessions of the peace for that county or riding, whose order shall therein be final, and conclude all parties.”

In the construction of these statutes the following opinions have been holden :

That by the 5 *Eliz. c. 4.* the justices of peace may bind a poor person to husbandry against the consent of his master ; but that neither by that statute, nor the statute 43 *Eliz. c. 2.* which empowers the churchwardens, &c., to raise a stock of money, by way of assessment on the parish, for that purpose, they could impose an apprentice on a tradesman against his consent, but must assent and raise money to bind him out.

T. Raym.
65. 177.
Sid. 99.
Lev. 84.
Vent. 325.
S. P. cont.
Rex v.
Fairfax,
Carth. 94.
Comb. 165.

S. C. 3 Mod. 269. S. C. Show. 76. S. C. resolved by three judges against Holt. [Although the several reporters, who have given us the history of the case of the King v. Fairfax, assign different reasons for the judgment of the court in that particular case, yet they all agree, that the three judges, *contra* Holt, C. J. were of opinion, that the stat. 43 *Eliz.* having empowered the churchwardens and overseers, with the assent of two justices, to bind parish apprentices where they should see convenient, the order for that purpose was compulsory on the master.]

That though by the statute 8 & 9 *W. 3. c. 30.* the master is bound under the penalty of 10 *l.* to keep an apprentice bound to him pursuant to the statute 43 *Eliz. c. 2.* yet, if two justices bind a poor girl to a merchant, and he appeals to the sessions, where the order is reversed, it being thought unfit to compel a merchant to take an apprentice, the court of King's Bench, on removing the order before them, may confirm the order of sessions, (as they did in this case); for the statute having given an appeal to the sessions, they are made thereby proper judges, whether the person be a proper person to impose an apprentice on or not.

2 Salk. 491.
pl. 57.
Minchamp's
case. [Rex
v. Saltern,
East. 24 G.
3. 1 Bot.
P. L. 555.
pl. 791.
S. P.]

The churchwardens and overseers need not aver, that the parents were not able to maintain the child, for they have a discretionary power, by the statute, of determining that.

Comb. 289.
per Holt,
C. J.

And as the justices of peace have a power of imposing an apprentice on a master, in consequence thereof, an indictment lies for disobedience to their orders, either in not receiving, or receiving and after turning off, or not providing for such apprentice ; for though an act of parliament prescribes an easier way of proceeding by complaint, yet that does not exclude the remedy by indictment.

6 Mod. 163.
Salk. 381.
The Queen
v. Gold.
[But the
indictment
must state,
that the
binding or
appointment

was a binding or appointment within the 43 *Eliz. c. 2.* Rex v. Trevilian, 2 Str. 1268.]

[It is said to have been the opinion of all the judges, that a parish apprentice may be put to a clergyman.

1 Conft's
Bott's P. L.
540. pl. 771.
Rex v. St.
Margaret's,
Lincoln,

So, a female parish apprentice bound to a day-labourer to learn the art and mystery of a housewife, has been holden good.

1 Conft's Bott's P. L. 549. pl. 787.

A person occupying land in a parish (a), but living out of it, is compellable to receive a parish apprentice. And a custom to bind only to occupiers of a particular description is not good.

Rex v.
Clapp,
3 Term Rep.
107. Rex v.

St. Nicholas, in Nottingham, 2 Term Rep. 726. Rex v. Saltern, 1 Conft's Bott's P. L. 555. pl. 791. (a) It is said, generally, that the binding of parish apprentices may be to a person residing in another parish. Rex v. St. Margaret's, Lincoln, 1 Conft's Bott's P. L. 549.

Rex v. Tun-
stead,
3 Term Rep.
523.

In binding apprentices under 20 G. 3. c. 36. it is not necessary that the master should actually reside within the parish: if he be an occupier there, it is sufficient; for *inhabitant* and *occupier* are for this purpose synonymous.

Rex v. Gil-
lister, Sir T.
Raym. 63.

It is said, that an order of apprenticeship need not state the trade to which the pauper is intended to be bound.

Rex v. Wag-
staff, Foley,
225.

But the justices cannot order, nor can the indentures covenant that the master, at the end of the term, shall give his apprentice two suits of clothes, one for holidays, and the other for working days; for this sounds like *wages*, and they can only order *maintenance*; and not even that after the term is ended.

Rex v.
Chalbury,
1 Conft's
Bott's P. L.
543. pl. 779.
(a) Rex. v.

A parish apprentice may be bound for a shorter, but not for a longer time than the statutes require; and if the indenture (a) be not for any certain time, it is not therefore bad; for with respect to the time, the statute is only directory.

Rex v. St.
Petrox,
Burr. Sett.
Ca. 249.
Id. ibid.

So, an indenture binding a poor girl an apprentice is not void for want of the alternative, "or till married."

And neither a parish indenture, nor a common indenture, though voidable, can be avoided but by the parties to it.

Rex v. Ham-
stall Red-
ware, 3 Term
Rep. 380.

Parish indentures must be assented to by two justices in the presence of each other; for if it be done by them separately, the indenture is void.

Rex v. Fleet,
Cald. 31.
2 Conft's
Bott's P. L.
547. pl. 482.
(b) Rex v. Saltern,

It is not necessary to the validity of the indentures of a parish apprentice, that the master should sign the counterpart. But after the master has signed the counterpart, he cannot appeal to the sessions (b).

(b) Rex v. Saltern, 1 Conft's Bott's P. L. 555. pl. 791.

Rex v. St.
Nicholas, in
Notting-
ham, 2 Term Rep. 726.

Nor is it necessary to their validity, that the apprentice should sign the deed.

Rex v.
Langham,
Cald. 126.
(c) Rex v.
Harburton,
1 Conft's Bott's P. L. 558. pl. 792.

An infant parish apprentice and his master cannot by themselves, without the assent of the parish officers, vacate the indentures. *Secus*, after the apprentice has attained twenty-one years of age (c).

By 32 G. 3. c. 57. § 11. "in every case where a parish apprentice shall be discharged under the 20 G. 2. c. 19. the two justices shall order the master or mistress to deliver up the apprentice's clothes, and to pay a sum not exceeding ten pounds to the parish officers, for the purpose of placing such apprentice out again. And the two justices may compel the parish officers to enter into a recognizance to prosecute the master or mistress of any such parish apprentice for ill-treatment of the apprentice."

By § 12. "the justices may order any master convicted under 20 G. 2. c. 19. when liable to take a parish apprentice, to pay to the parish officers a sum not exceeding ten pounds, nor less than

“ than five pounds, for the binding out such poor child.
 “ But such master may appeal to the quarter sessions, on giving notice, &c.”

By § 8. “ if any master or mistress become insolvent, two justices, where such master or mistress live, may, on the application of such master or mistress, discharge any such apprentice from the indentures, if upon inquiry they find the allegation of insolvency to be true.” But by § 9. “ this shall not extend to any indenture under the 43 *Eliz. c. 2.* where a larger sum than five pounds shall have been given.”]

(D) Of the Necessity of serving an Apprenticeship, as a Qualification to follow a Trade within the 5 *Eliz. c. 4.*

A T common law, every person might follow what lawful trade he pleased; which being inconvenient in many instances, and a detriment to the publick, in permitting persons to exercise trades in which they had little or no skill or experience; to prevent this mischief, and the better to train up and enure persons to labour and industry from their youth, and thereby make them more skillful and expert,

It is enacted by the (a) 5 *Eliz. c. 4.* § 31. “ That it shall not be lawful to any person or persons, other than such as now do lawfully use or exercise any art, mystery, or manual occupation, to set up, occupy, use or exercise any craft, mystery, or occupation, now used or occupied within the realm of *England* or *Wales*, except he shall have been brought up therein seven years, at the least, as an apprentice, in manner and form above-said; nor to set any person on work in such mystery, art, or occupation, being not a workman at this day, except he shall have been apprentice, as is aforesaid; or else having served as an apprentice, as is aforesaid, shall or will become a journeyman, or hired by the year; upon pain, that every person willingly offending, or doing the contrary, shall forfeit and lose for every default forty shillings for every month.”

goods to sale ill wrought; for by such means he will never sell more; *per Dolben*, Justice. See stat. 8 Ann. 9. § 39.

11 Co. 53.
 2 Bull. 191.
 Skin. 133.
 Sand. 312.

(a) It is said, that no encouragement was ever given to prosecutions upon this statute, and that it would be for the common good, if it was repealed; for no greater punishment can be to the seller than to expose
 3 Mod. 317.

[But by the 15 *Car. 2. c. 15.* hemp-workers of all kinds, net-makers, and makers of tapestry hangings, may set up without having served seven years.

By 24 *G. 3. sess. 2. c. 6.* § 1. 4. all officers, mariners, and soldiers, who have been in the land or sea service, or in the marines, or in the militia, or any corps of fencibles, since the second year of his majesty's reign, and have not deserted, their wives and children, may exercise such trades as they are apt for, in any town or place.

By

By 26 G. 3. c. 107. § 131. every person having served in the militia, when drawn out into actual service, being a married man, may exercise any trade in any town or place.

By 6 & 7 W. 3. c. 17. an apprentice discovering two offenders guilty of coining, so as they be convicted, shall be deemed a freeman, and may exercise his trade, as if he had served out his time.

And by the 17 G. 3. c. 33. it shall be lawful for any person carrying on or using the trade of a dyer within the counties of *Middlesex, Essex, Surry, and Kent*, to employ journeymen who have not served an apprenticeship to the trade, without incurring any penalty.

The like liberty is given to hatters generally by the 17 G. 3. c. 55. § 5. and to woolcombers by 35 G. 3. c. 124.]

In the construction of the statute of the 5 Eliz. c. 4. it will be necessary to consider,

1. What shall be said such a Trade as a Person is prohibited to follow.

2 Salk. 611. Herein we must observe, that it hath been ruled, that there are many trades within the general words and equity of the act, besides those which are particularly enumerated therein; yet it seems agreed, and hath frequently been (a) adjudged, that in every indictment, &c. it must be alleged, that it was a trade at the time of making the statute; for the words thereof are, *any craft, mystery, or occupation now used*, &c.; from whence it seems to follow, that a new manufacture, which to all other purposes may be called a trade, is yet not a trade within this statute.

2 Salk. 611. pl. 3. Ld. Raym. 513. 2 Ld. Raym. 1188, 1189. So, for not averring, that the trade of a tyler was an art or mystery used in England at the time of the making the statute, though the statute expressly mentions it. 4 Mod. 145-6. But Comb. 288. *contra*.

8 Co. 130. Also, it seems agreed, that the act only extends to such trades as imply mystery and craft, and require skill and experience; and that therefore (b) merchants, husbandmen, gardeners, &c. are not within the statute; and on this foundation it hath been held, that (c) a hemp-dresser is not within the statute, as not requiring much learning or skill, and being what every husbandman uses for his necessary occasions.

pl. 4. It is said in (d) 2 *Bulf.* to have been adjudged, that an upholsterer is not a trade within the statute, as not requiring (e) skill; but this hath been contradicted by a later (f) resolution, wherein it is said to have been resolved, that a (g) barber and taylor were trades within the statute.

(a) But see Roll. Rep. 10. (f) 1 Lev. 243. Sid. 367. pl. 4. 2 Keb. Rep. 366. pl. 19. Vent. 346. 2 Salk. 611. pl. 3. Ld. Raym. 514. (g) Lev. Rep. 87. 243. 2 Lev. Rep. 206. Sid. 367. pl. 4. Vent. 326. Keb. Rep. 411. pl. 115. *id.* 422. pl. 143.

2 *Bulf.* 189, Also, it is said in 2 *Bulf.* that a pippin-monger is not within the statute, because there is no mystery in buying apples, and all his skill

Skill is in so laying his apples as to keep them from rotting: but this likewise hath been doubted in a late (a) case, where it was debated, whether the using of the trade of a costermonger or (b) fruiterer be within the statute; but there is no resolution.

Vent. 326. 346. 2 Salk. 611. pl. 2. S. C. cited, and said not to be resolved. (b) 3 Keb. Rep. 816. pl. 38.

Ld. Raym. 514.
2 Salk. 611.
pl. 2.
(a) 2 Lev. 206.
3 Keb. Rep.

It is clearly agreed, that the following the common trade of a brewer, baker, or cook, is within the statute, as unskilfulness herein may be very prejudicial to the lives and health of his majesty's subjects; but it is at the same time agreed, that the exercising of any of these trades in a man's own house or family, or in a private person's house, is not within the restraint of the statute.

11 Co. 54. a.
Cro. Car. 499.
Mo. 886.
Hob. 183.
211.
8 Co. 129.
Palm. 542.
Lit. Rep. 251. Bridgm. 147.

On motion to quash an indictment for using the trade of a fellmonger, it was urged, that this was a business which required no skill, for that it was only to pull the wool from the skin; but *per Holt*, Chief Justice, if in the indictment it be averred to be a trade at the time of making the statute, we will not quash it; for whether it was a trade then or no, or whether any skill be requisite to the exercise of it, is a matter of fact proper for the trial of a jury.

2 Salk. 611.

So, the court refused to quash an indictment for using the trade of a seamstress, not having served as apprentice; because it was set forth in the indictment to be a trade in *England* at the time of making the act; so that if this trade of a seamstress be not within the act, the defendant will have the advantage of it on the trial.

2 Salk. 611.
pl. 3.
2 Ld. Raym. 1189.

But it is said, that the court had quashed an indictment for following the trade of a merchant-taylor, because they did not know what was meant by it, and it seemed to them nonsense and unintelligible.

2 Salk. 611.
pl. 3. The King v. Harper.
2 Ld. Raym. 1189.

A coach-maker is within this statute.

[It hath been objected, that the using of a trade in a country village, is not within the statute; and in the case of *Rex v. Langley*, *H. 6 G. 2.* Mr. J. *Page* said, he had known indictments quashed upon such exception. It is said however (c) by a very respectable author, that he doth not apprehend it would be now allowed; for, in such case, at the sittings at *Westminster* it was mentioned, but Lord Ch. J. *Lee* made slight of the objection. In a subsequent case (d), on motion to quash an information against the defendant for exercising the trade of a baker without having served an apprenticeship at the parish of *S. in Kent*, one objection was, that it did not appear on the record that the offence was committed in a city, borough, or market-town; but the court held, that neither the enacting part of the statute, nor the preamble, gave any foundation for this objection, and that the offence was clearly well laid; though they said, if it came out in evidence, that the defendant followed the business only in a small village, it had been the common practice to find for him.]

2 Ld. Raym. 1189.
Vent. 346.
1 Mod. 26.
2 Keb. 583.
1 Ventr. 51.
(c) Bull. N. P. 192.
(d) Ball v. Cobus,
1 Burr. 366.

2. What Manner of following or exercising a Trade shall be said within the Statute.

11 Co. 54.
Hob. 183.

It seems agreed, that the following a trade within this statute, must be such whereby the party gets his livelihood; and that therefore the using of a trade of a brewer, baker, cook, taylor, &c., in one's own house, or in the private family of another, without any reward, is not within the statute.

Carth. 162.
2 Salk. 610.
pl. 1.
3 Mod. 313.
Hobs quitam
v. Young.
Show. 241.
266.

But in an action for using the trade of a clothier, not having been apprentice to that trade; where by special verdict it was found that *A.* was a *Turkey* merchant, and exported great quantities of *English* cloth into the *Levant*; and for this purpose *only* he hired several cloth-workers, who had been all apprentices to the same trade, and kept also a master-workman of that trade to inspect their work; and that by these men he made great quantities of *English* cloth, all which he transported; and that he the said *A.* kept a dye-house, and hired men of that trade to dye his own clothes, and no other: It was resolved to be within the restraint of the statute, though the cloth was made for his (*a*) own merchandize only, and though made by persons who had been apprentices; for here they are not traders, but hirelings, and he is the tradesman who hath all the profit, as *A.* in this case has.

the trade by the master, it cannot be also an exercising of it by the journeyman, so as to expose him to the penalties of the statute; and whether the utterance be in England or in Turkey is not material.
2 Salk. 610. pl. 1.

Carth. 164. So, if a man keeps journeymen shoemakers to make shoes for exportation, this is an exercising the trade (*b*) of a shoemaker within this statute.

[(*b*) But if it be an exercising of the trade by the master, it cannot be also an exercising of it by the journeyman, so as to expose him to the penalties of the statute. Beach v. Turner, 4 Burr. 2449.]

Raynard
v. Chafe,
1 Burr. 2.
2 Will. 40.
S. C.

[But if a person brought up to the trade take a partner, who hath not served an apprenticeship to the trade, such partner, if he share only in the profits or loss of the business, and do not actually exercise the business, is not liable to the penalties of this act.]

Carth. 163.
1 Vent. 51.
2 Keb. Rep.
1 Black.
Com. 416.
Show. Rep.
242.

It hath been also holden, that this statute doth not restrain a man from using several trades, so as he had been an apprentice to all; wherefore it indemnifies all petty chapmen in little (*c*) towns and villages, because their masters kept the same mixed trades there before.

(*c*) It seems to be the better opinion, that this statute hath not abrogated the particular customs concerning trades in particular towns and villages; and that therefore a widow, by custom, may continue her husband's business; and it seems, by some opinions, she may do it without any such custom, for that the wife serves as an apprentice; but for this *vide* Cro. Car. 347. 516, 517. 2 Bulf. 187. 8 Co. 130. Palm. 541. 11 Co. 54. Noy, 5. Hutt. 131. Hob. 211. Sand. 311. Carth. 163.

Carth. 163,
164. *per*
Holt. Show.
Rep. 267.
Comb. 179.

If a coachmaker keeps servants to make his wheels, and workmen to curry his own leather, this is against the statute, because it is he only who receives all the profits of the several trades, and the wheelwright and the currier are but his servants.

Carth. 162.
cited per
Holt, C. J.

So, in a case upon this statute, prosecuted by the Horners Company against a comb-maker in *London*, for using the trade of a horner,

horner, viz. in pressing horn for making combs, which pressing did not belong to their trade; this was adjudged a breach of the statute, for a horner is a particular trade, and a very ancient company in London.

Comb. 180.
Show. Rep.
242.
1 Mod. 190.

3. What Kind of Service will be a sufficient Qualification within the Statute.

As to this it hath been resolved, that there is no occasion for an actual binding, but that the following a trade for seven years is a sufficient qualification within the statute. pl. 7. S. P. being a hard law. Ld. Raym. 738.

Salk. 67.
pl. 5.
2 Salk. 613.
Ld. Raym. 738.

So, where an action was brought on this statute, and upon not guilty pleaded, it appeared, that the defendant's father kept the same trade, and that he the defendant for several years had been employed by his father therein; it was held, that he might lawfully use that trade, for that he had been (a) *quasi* an apprentice to it, which was sufficient to satisfy the statute.

Carth. 163.
per cur.
Sef. Caf.
290. pl. 227.
1 Bl. Com.
428.
(a) And for the like reason it seems, that a wife living with her husband seven years, may after his death continue the trade; for the act does not require a man or a woman to be an actual apprentice, but the words are *tangam* an apprentice. Vide the authorities *supra*.

So, if a man lives with another, that uses a trade which the other is not qualified for using, seven years, he may set up the trade as well as if he had lived with one never so well qualified.

Ca. Law
and Eq. 72.

Also, it hath been held, that the service need not be in any particular country; and therefore an indictment for using the trade of a taylor, not having served an apprenticeship seven years, was quashed, because only said, not having served as an apprentice *infra regnum Angliæ aut Walliam*; for it may be he did so beyond sea; and if it were any where, it suffices.

Salk. 67.
pl. 2.
The King
v. Fox.

So, it hath been held, that serving five years to a trade out of England, and two in England, is sufficient to satisfy the statute, but that there must be a service of a full time either in England or out of England; and therefore serving five years in a country, where by the law of the country more is not required, will not qualify a man to use the trade in England.

Ca. Law
and Eq. 70.
See 3 Keb.
Rep. 550.
pl. 55.

[So, it hath been holden, that if any man as a master has exercised and followed any trade as a master without interruption or impediment for the term of seven years, he is not liable to be prosecuted on this statute. So, if he hath worked at or followed two or more different trades for the term of seven years or more.]

French v.
Adams,
2 Will. 168.
Wallen v.
Holton,
1 Bl. Rep.
233. If he
has exercised a trade for seven years without any prosecution with effect.

4. By whom the Offence of following a Trade without a Qualification is cognizable.

This matter depends chiefly on the statute 31 Eliz. c. 5. § 7. whereby it is enacted, "That all suits for using a trade without having been brought up in it, shall be sued and prosecuted in the general quarter-sessions of the peace, or assizes of the same county where the offence shall be committed, or otherwise inquired

“ inquired of, heard and determined in the assises, or general
 “ quarter-sessions of the peace for the same county where such
 “ offence shall be committed, or in the leet within which it shall
 “ happen, and not in anywise out of the same county where such
 “ offence shall happen or be committed.”

Cro. Jac.
 178.
 Hob. 184.
 Salk. 373.
 pl. 14.

In the construction hereof it hath been holden, that it restrains not a suit in the King's Bench or Exchequer, for such offence happening in the same county where these courts are sitting; for the negative words of the statute are not, that such suits shall not be brought in any other *court*, but that they shall not be brought in any other *county*; and the prerogative of these high courts shall not be restrained without express words.

Hob. 184.
 327. Cro.
 Jac. 85.
 pl. 9.

But where the offence is in a different county, such suits in these, or any other courts, out of the proper county, seem to be within the express words of the statute.

Sid. 303.
 Keb. 584.
 2 Lev. 204.
 Vent. 8.
 364.
 2 Lev. 204.
 Salk. 372.
 pl. 13.
 5 Mod. 425.
 [See 4 Term
 Rep. 109.]

Yet it hath been doubted, whether an action of debt, or information in the courts of *Westminster-hall*, were not to be construed to be out of the meaning of the statute; but it seems to be now settled, in the construction of the statute 21 Jac. 1. c. 4. which provides, that no action of debt or information, or other suit whatever, can be brought in any court of *Westminster-hall* on any penal statute, made before the said statute of 21 Jac. 1. for any offence therein excepted, for which the offender may be prosecuted in the country; unless such offence shall be committed in the same county in which such court shall sit.

Jon. 193.

But these statutes hinder not the removal of any indictment into the King's Bench by *certiorari*, after which it may be tried there, or in the county by *nisi prius*.

6 Mod. 220.
 2 Salk. 370.
 pl. 2.
 2 Ld. Raym.
 1038. 1179.
 Comb 254.
 355. 1 Burr. 251.

It hath been held, that quarter-sessions of boroughs may receive indictments on the 5 Eliz. c. 4. as well as those of the county at large, in that there is no danger of oppression, because a *certiorari* lies.

[So, they may proceed by information. Cowp. 369.]

5. Of the Form of the Proceedings in order to a Conviction, for following a Trade without being qualified.

Sid. 302.
 pl. 9.
 Dring v.
 Respass.
 [(a) Such
 allegation
 not necessa-
 ry. 1 Burr.
 367.]

The plaintiff, in an action on this statute 5 Eliz. c. 4. must (a) allege in his declaration, that the defendant did not use the trade at the time of making the statute; for though it cannot be presumed that he did, after such a length of time, yet as the statute makes him liable, and subjects him to a penalty; the prosecutor must shew that he has transgressed the law, and that he is entitled to his action.

2 Kel. 212.
 pl. 165.
 The King v.
 Briton,
 Posch.
 5 Geo. 2.
 2 Barnard,
 K. B. 147. 172. S. C.

An indictment for following the trade of a *cutler*, not being an apprentice, *contra form.* 5 Eliz. c. 4. was quashed on demurrer; because the trade of a cutler was averred to be a trade then used *infra hoc regnum Angliæ*, whereas this kingdom was not then subsisting.

It has been held, that an indictment against two, or more, for following a joint-trade, without having served a seven years apprenticeship, required by the statute, is naught, in that it would be absurd to charge them jointly, because the offence of each defendant arises from the defect peculiar to himself.

5 Mod. 180. Salk. 382. 2 Roll. Abr. 81. (N), pl. 6. 2 Sef. Caf. 221. pl. 154. 2 Ld. Raym. 1248. Vent. 302. 1 Str. 623.

[In an indictment on this statute it is not necessary to specify and aver the want of other qualifications allowed by subsequent statutes, for such other qualifications or exceptions ought to be shewn by the defendant.]

Rex v. Pemberton, 2 Burr. 1035. 1 Bl. Rep. 230. S. C.

(E) Of assigning and turning over Apprentices to other Masters.

THE placing out an apprentice to a particular person arises from an esteem, and a good opinion of the party to whom he is so committed, that he will not only instruct him in his trade or calling, but will also be careful of his health and safety; and therefore the law has made it such a personal trust or confidence, that the master cannot assign or transfer it over to another. The master must also have the apprentice under his own care and inspection, and cannot send him abroad, though under the pretence of improvement, unless by express agreement, and unless the nature of his business requires it, and implies such a power as that of merchant-adventurer, sailor, &c. are said to do; therefore it hath been adjudged, that a surgeon sending his apprentice a voyage to the *East-Indies*, though in company with other surgeons, and the better to instruct him in the art of surgery, was a breach of his covenant, whereby he bound himself to retain, teach, keep, and employ the said apprentice in his own house and service, &c.

Hob. 134. pl. 180.

But by the custom of *London*, a freeman of *London* may turn over his apprentice to another master, being a freeman; and such second master shall have the same benefit of the apprentice's covenants, as shall the apprentice of the covenants on the side of the master, as if he had been originally bound to him.

March, 3. Keb. 250.

But it hath been held, that though justices of peace have a jurisdiction of discharging apprentices, and may bind them to other masters, that they cannot turn them over (a); and therefore an order that an apprentice, whose master was dead, should serve the remainder of his time with his master's widow's second husband, was quashed; because the justices have nothing to do about turning over an apprentice; and that though he applied to them, that could not give them a jurisdiction.

Comb. 324. The King v. Chaplain. [(a) They cannot judge of an assignment, for they cannot try the validity of a

deed. Rex v. Barnes, 1 Str. 48.]

[By 32 Geo. 3. c. 57. § 5. any master or mistress taking a parish apprentice under the 8 & 9 W. 3. c. 30. § 5. may, by indorsement on the indentures, or by other instrument in writing, and with the consent of two justices, testified by such justices under their

hands, assign such apprentice for the residue of the term. And by § 7. the person to whom such apprentice is intended to be assigned, shall, at the same time, on the counterpart of the indentures, &c., declare his acceptance of such apprentice, and acknowledge himself bound by the covenants in the indenture; and such master or mistress, so taking an apprentice by assignment, may, from time to time, assign such apprentice over to any other master or mistress.]

(F) Of making Apprentices free.

Sid. 107. pl. 20. **2 Show. 154. pl. 138.** [By the 12 G. 3. c. 21. where any person entitled to his freedom shall apply to the mayor, &c. to be admitted, giving notice and specifying the nature of his claim, and the mayor, &c. shall not admit him within a month afterwards, a *mandamus* shall go, and if he be admitted, the mayor, &c. shall pay costs.] **(a)** Mr. Common Serjeant said, that if a man trade upon his own account within the seven years of his apprenticeship, the chamberlain of London will not make him free, because he has not fully served an apprenticeship of seven years. **1 Ld. Raym. 383.**

W Herever by the custom of any town, borough, &c., the serving an apprenticeship entitles the party to his freedom, the persons refusing to admit him, without sufficient (a) cause, may be compelled thereto by *mandamus*.

Lev. 93. Sid. 107. Keb. Rep. 458. pl. 57. id. 470. pl. 79. id. 659. pl. 43. T. Raym. 69. Towns- end's case.

Therefore, where to a *mandamus* to the mayor, &c. of Oxford, to admit a person to be free of that city, who had served seven years apprenticeship; to which it was returned, that he put himself apprentice seven years according to the custom, and that he covenanted to serve seven years, and not to marry within the time, and that within the first two years he married, and so broke his covenant; and that his master accepted of him to serve for the residue of the time, which he did, but not as an apprentice, but rather as a journeyman; though it was urged, that by his breach of covenant he lost his right of freedom, yet the court held the contrary; and that though an action of covenant might lie, yet that it was no loss of his freedom; and therefore awarded a peremptory *mandamus* to admit him.

Rex v. Mayor of Lincoln, 5 Mod. 402. Carth. 448. S. C. Ld. Raym. 337. S. C. [Rex v. Tur- key Company, 2 Burr. 1004. S. P.]

So, where a *mandamus* to the mayor, &c. of Lincoln, to admit A. to his freedom, he having served an apprenticeship there; and the mayor returned, that A. (being a Quaker), refused to take the usual oath, according to the custom of the said city, but offered to take the solemn affirmation and declaration; the court held this sufficient to entitle him to his freedom, within the statute 7 & 8 W. 3. c. 34.

6 Mod. 227. 260. [1 Ld. Raym. 382.]

Also, it is frequent for masters to bind themselves to make their apprentices free at the end of their time, which they must perform according to their covenants.

(G) How Apprentices are to be taken Care of when their Masters happen to (a) die.

IT seems agreed, that if a man be bound to instruct an apprentice in a trade for seven years, and the master die, that the condition is dispensed with, being a thing personal; but if he be bound further, that in the mean time he will find him in meat, drink, clothing, and other necessaries, here, the death of the master doth not dispense with the condition, but his executors shall be bound to perform it, as far as they have assets. [For there is a great difference between a covenant to *maintain*, and a covenant to *instruct*; the first is a lien upon the executor, though not named, in right of the testator's assets being come to his hands; but the other is a *fiduciary* trust annexed to the person of the master.] shall be done with an apprentice upon the master's dying, which is a case which must needs often happen. Burn's Observ. 245.

Sid. 216. pl. 21. Keb. 761. 820. Lev. 177. [1 Confit's Bott's, P. L. 524. pl. 745. Cro. El. 553.] Burn, 58. (a) There seems to be no sufficient clear provision, what

But if a person is bound apprentice by justices of peace, and the master happens to die before the term expired, the justices have no power to oblige his executor, by their order, to receive such apprentice, and maintain him; for by this method the executor is deprived of the liberty of pleading *plene administravit*, which he may do, in case covenant be brought against him, and must maintain the apprentice, whether he hath assets or not.

Carth. 231. Salk. 66. pl. 1. Show. 405. The King v. Peck.

But it is said, that in the case of the master's dying, by the custom of *London*, the executor must put the apprentice to another master of the same trade.

Salk. 66. pl. 1. 204. pl. 2. Per Holt,

C. J. March, 3. pl. 6. Keb. Rep. 250. pl. 15. Boh. Priv. Lond. 339, 340.

[By 32 G. 3. c. 57. § 1. if the master or mistress of any parish apprentice die during the term of such apprenticeship, upon whose binding no larger sum than five pounds shall have been paid, the covenant in the indenture for the maintenance of such apprentice shall not continue in force longer than three calendar months after the death of such master or mistress; during which three months the apprentice shall continue to live with and serve the executors or administrators, or with such person as they shall appoint. And in all such parish indentures of apprenticeship there shall be annexed to the covenant for maintenance, a proviso that such covenant shall not continue longer than three calendar months after the death of such master or mistress; but if such proviso be omitted, the covenant on the part of the master or mistress to maintain the apprentice shall continue only for three calendar months after his or her death: within which three calendar months, by § 2. two justices of the peace where the master or mistress died, shall, on the application of the widow of such master, or the husband of such mistress, or of any son, daughter, brother, or sister, or of any executor or executrix, administrator or administratrix, of the deceased, by indorsement on the indenture, direct the apprentice to serve another master for the remainder of his term. And by § 3.

the same regulations which are above directed to take place on the death of any original master or mistress, shall also take place on the death of any subsequent master or mistress. By § 4. if no application be made to two justices within the three months, or if, on application, the two justices should not think fit to continue such apprenticeship, the indentures shall be void. But by § 5. this act shall not extend to any parish apprentice not living with and serving such original or subsequent master or mistress at the time of his or her death. By § 6. if the original master or mistress, or any subsequent master or mistress, or the personal representative of such master or mistress, having assets, during the three months, shall refuse or neglect to maintain and provide for such apprentice according to the form of such covenant, two justices, on complaint of the apprentice, or the parish officers, may levy sufficient for the purpose by distress and sale of the effects or assets of such master or mistress.]

(H) Of Servants' Wages, how recoverable.

9 Co. 88. a. b.
2 Roll. Rep.
269:

IT is clearly agreed, that if a person retains a servant, and agrees to pay him so much by the day, month, or year, that the servant may have an action against the master on the contract, or against his executors; and that every such retainer will be presumed to be in consideration of wages, unless the contrary appears.

Brownl. 54.

So, if a man be retained in *London*, to serve beyond sea, he may have his action for his wages in *England*; and lay his action in any county, in like manner as an obligation bearing date at *Roan* in *France*, may be sued in *England*, alleging the place to be in such a county where he brings his action.

Bridgm. 119.

"As to the jurisdiction of justices of peace herein, by the 5 *Eliz. c. 4.* § 15. for the declaration and limitation what wages servants, labourers, and artificers, either by the year or day, or otherwise, shall have and receive, it is enacted, That the justices of peace of every shire, riding, and liberty, within the limits of their several commissions, or the more part of them, being then resident within the same, and the sheriff of that county, if he conveniently may, and every mayor, bailiff, or other head officer within any city or town corporate, wherein is any justice of peace, within the limits of the said city or town corporate, and of the said corporation, shall yearly at every general sessions first to be holden and kept after *Easter*, or at some time convenient within six weeks next following every of the said feasts of *Easter*, assemble themselves together; and they so assembled, calling unto them such discreet and grave persons of the said county, or the said city, or town corporate, as they shall think meet, and conferring together, respecting plenty or scarcity of the time, and other circumstances necessary to be considered, shall have authority by virtue thereof, within the limits and precincts of their several commissions, to limit, rate, and appoint the wages, as well of such and so many of the

" said

“ said artificers, handicraftsmen, husbandmen, or any other labourer, servant, or workman, whose wages in time past hath been by any law or statute rated and appointed, as also the wages of all other labourers, artificers, workmen, or apprentices of husbandry, which have not been rated, as they the same justices, mayor, or other head officers, within their several commissions or liberties, shall think meet by their discretions to be rated, limited, or appointed by the year, week, month, or otherwise, with meat and drink, or without meat and drink; and what wages every workman or labourer shall take by the great for mowing, reaping, or threshing of corn and grain, or for mowing or making of hay, or for ditching, paving, railing, or hedging by the rod, perch, lugg, yard, pole, rope, or foot, and for any other kind of reasonable labour or service,” &c.

In the construction of this statute, the following opinions have been holden:

That though the statute only gives the justices power to set the rate for wages, and not to order payment; yet grafting hereupon they may now, from the frequent practice, and the indulgence the law gives to remedies for wages, order payment, as well as assess the rates.

2 Ld. Raym. 820, 821. Fortesc. Rep. 317, 318. 6 Mod. 91. 204. 10 Mod. 68. 485. 3 Salk. 65. Caf. 35. pl. 37. Caf. of Set. and Rem. 234. 2 Salk. 441. pl. 3. 442. pl. 5. 484, 262. Str. 8.

That though a single justice may compel payment, yet the power of settling wages is only in the sessions; and that a single justice cannot arrest the party refusing to pay in the first instance.

Hil. 3 G. 2. Shergold and Holloway, in B. R. 2 Stra. 1002. S. C. 2 Sef. Caf. 100. pl. 100. S. C.

That justices of peace have no jurisdiction to judge of wages, except in case of husbandmen; but yet the court in favour of servants will always, unless the contrary appears upon the face of the order, presume servants to be servants in husbandry, and will admit of no collateral proof to the contrary.

Ca. Law and Eq. 68. 6 Mod. 91.

But an order, that a person shall pay so much to his coachman, was quashed; for here it appears, upon the face of the order, that he is not a servant in husbandry.

2 Jon. 47.

And on the authority of this case it hath been held, that the justices cannot make orders for the payment of footmen, bricklayers, carpenters, &c. servants' wages; because their jurisdiction is confined to the wages of such servants, whom they may compel to serve according to the statute

6 Mod. 204, 205.

So, where, upon the face of the order, it appeared to be for the payment of the wages of two persons retained by A., overseer of the works in the gardens of *Hampton-Court*, the order was quashed. But in this case it was held, that had the order been general, viz. to pay so much to two of his labourers, or two of his servants, the court would have supposed them servants in husbandry; but that here there was no room for such an intendment, since the contrary appeared.

2 Salk. 442. pl. 5. 6 Mod. 204. Fortesc. Rep. 317. Caf. of Set. & Rem. 234. 2 Salk. 261. pl. 20.

So, where one *Rycraft*, a justice of peace in *Middlesex*, made an order for the payment of a seaman's wages; upon an action brought against him, the plaintiff recovered 30 *l.* damages,

5 Mod. 140.

Reg. v. [It hath been holden, that this statute extends to covenant-
 Cecil, 2 Ld. servants, if in husbandry.
 Raym 1305.
 11 Mod. 266. S. C.]

Id. ibid. But if the order bear upon the face of it, that it was made upon the oath of the servant, it will be quashed; for there is no necessity to resort to the oath of the party in this case, since evidence may be given of the service.]

(I) What Acts of the Servant are deemed the Master's, for which the Master may take Advantage.

Lit. § 433. **T**HERE are several acts, which, being done by a servant, will be equally effectual and advantageous as if done by the master himself. Hence it is held, that continual claim made by a servant is good; as, if he enters into a part and claims, &c. or if the master says, that he dares not go to any part of the land, nor approach nearer than D., and commands his servant to go to D. and claim, and the servant does so; this is sufficient, though the servant had no fear, for he doth as much as he was commanded to do, and all that his master durst, or ought by the law, to do.

Lit. § 435. But if the master be in health, and command his servant to go to the land and claim, &c., in this case, a claim made by the servant, as near as he dares, is void; for he does not do all that he is commanded, nor so much as the master durst have done.

Co. Lit. But if the master be sick, or a recluse, (one who, by reason of his order, cannot go out of his house,) and he command his servant to go and claim for him, and the servant go as near as he dares by reason of fear, &c., this is sufficient, though the command were to go to the land; and yet, regularly, when a servant doth less than he is commanded, his act is void; but when a servant exceeds his master's command, it is void only so far as he hath exceeded.

2 Roll. Abr. 5. If a feoffment with livery be made of land, the servant of the owner being in possession, the livery is void, though made with the consent of the servant; for the servant continuing in possession, it must be only for the use and benefit of him that placed him there, and, consequently, the possession of the servant must be looked upon as the possession of the master; and the servant having no interest, but in right of his master, his consent was void, and he could neither make a surrender, nor a tenancy at will, to the feoffor.

Co. Lit. 117. a. The master hath an interest in the labour and acquisitions of his servant, and his acts herein are said to be for the benefit of the master, according to the rule. *Quicquid acquiritur servo acquiritur domino*; but the master of a hired servant cannot maintain trover for any property acquired by the servant; nor can he have any

other remedy against a person who employs him, but an action on the case *per quod servitium amisit*.

But it is otherwise of an apprentice; and therefore where a waterman's widow took an apprentice, who went to sea, and earned two tickets, which came to the defendant's hands; the widow brought trover, and had judgment; for what the apprentice gains, he gains to his master; and whether legally apprentice, or not, is no ways material, for it is enough if he be so *de facto*. Salk. 68. pl. 8. Barber and Dennis. 12 Mod. 415.

It is said, that the master shall have advantage of his servant's contracts, in the same manner as he shall be bound by them, as to those matters which come within his compass as a servant; as, where a servant was sent by a master to a debtor, and appointed by him *ad componendum et agreandum* the money due from the debtor; and there being a promise made to the servant, to pay what was due upon the balance and agreement, it was held, that the master might maintain an action in his own name, on the promise to his servant. Godb. 360, 361. Seignior and Walmer.

If the servant is robbed of the master's goods, the master or servant may have an appeal. Stamf. 60. Bro. tit. Appeal, 92.

Latch, 127. S. P. and he that begins first shall recover, and prevent the other of his action. *Per* Dodderidge.

If a servant is couzened of his master's money, the master may have an action on the case against the couzenor. Roll. Abr. 98. Cro. Jac.

223. [Where a clerk had embezzled notes and money belonging to his master to a considerable amount, which he had paid away to the defendant, in the insurance of tickets in the lottery, which insurance was contrary to the statute of 12 Geo. 3. c. 3. § 36. it was holden, that as these notes and money were not paid *bonâ fide*, but for an illegal consideration, and their identity could be traced, the master should recover them. *Clarke v. Shee*, Cowp. 197.]

If a servant be robbed of his master's money, though in the absence of his master, the master may maintain an action for it against the hundred. But for this *vide* tit. Hurd and Cry.

(K) What Acts of the Servant shall be deemed the Master's, for which the Master shall answer and be bound.

THE reason why the acts of a servant are, in many instances, esteemed the acts of the master, arises from the relation between a master and servant; for, as in strictness every body ought to transact his own affairs; and it is by the favour and indulgence of the law, that he can delegate the power of acting for him to another, it is highly reasonable that he should answer for such substitute, at least *civiliter*; and that his acts being pursuant to the authority given him, should be deemed acts of the master.

Therefore, if a servant sells a piece of cloth, and warrants it to be good, an action of deceit lies against the master. 11 E. 4. 6.

5 Co. Pilk-
ington's
case. 2 Roll.
Abr. 693.
Cro. Eliz. 181.

So, if a man brings a horse to a smith to be shod, and the servant pricks it; or if the servant of a surgeon makes the wound worse; in both these cases an action lies against the master.

9 H. 6. 53.
Roll. Abr.
95. (a) If a
servant sells
an unsound
horse, or

So, if the servant of a taverner sells wine to another, which is corrupted, an action on the case lies against the master, though he did not command the servant to sell it to any (a) particular person.

other merchandize, in a fair, no action lies against the master, unless he commanded him to sell to a particular person. 9 H. 6. 53. Roll. Abr. 95. S. C. Fitz. *Action sur la Case*, 5. S. C. Poph. 143. and 2 Roll. Rep. 6. S. C. cited. — But if by the command and covin of the master, he sells to a particular person, an action lies against the master, for it is then his own sale. 9 H. 6. 53. Roll. Abr. 95. Bridgm. 12 S. C. cited.

Cro. Jac.
471. 2 Roll.
Rep. 28.

So, if a goldsmith makes plate, wherein he mingles dross, so that it is not according to the standard, and by his servant sells it; an action lies against the master, because it fails in the price in silver.

2 Roll. Rep.
5. 26, 27.
Bridg. 125.
Poph. 143.
Cro. Jac.
459.
Southern v.
Haw.

But if *A.* being possessed of certain artificial and counterfeit jewels of the value of 168*l.*, and, knowing them to be such, delivers them to *B.* his servant, commanding him to transport the said jewels to *Barbary*, and to sell them to the king of *Barbary*, or such other person as would buy them; but (*b*) gives *B.* no charge to conceal their being counterfeit; and thereupon *B.* goes into *Barbary*, and, knowing those jewels to be counterfeit, shews them to *C.* for good and true jewels, and affirming to *C.* that they were worth 810*l.*, desires *C.* to sell them to the said king for 810*l.*, which money *C.* pays *B.*, and *B.* thereupon immediately returns to *England*, and pays the 810*l.* to *A.* his master; and after, the jewels being discovered to be counterfeit, *C.* is imprisoned by the said king, till he repays the 810*l.* out of his own effects; of all which matters *C.* gives notice to *A.*, and demands satisfaction, &c., yet no action lies against *A.*, for jewels are in themselves of an uncertain value, and *B.* was not by *A.* particularly directed to *C.*, and all that was done *quoad C.* was the voluntary act of the servant, for which the master is not bound to answer.

(b) Accord-
ing to the
report of this
case in Cro.
Jac. it is
said, that
the court in-
clined
against the
plaintiff,
principally
because *A.*
did not order
B. to conceal
their being
counterfeit.
Dyer, 161.
3 pi. 48.
3 Mod. 33.
S. C. cited.

King *E. 6.* sold a quantity of lead to *A.* and appointed the Lord *North*, who was then chancellor of his court of Augmentations, to take bond for payment of the money; the Lord *North* appointed one *B.*, who was his clerk, to take the bond, which was done, who delivered it to the lord; and he delivered it back again to his clerk, in order to send it to the clerk of the court of Augmentations; *B.* suppressed this bond; and it was held by all the judges, that the Lord *North* was chargeable to the king; because the possession of the bond by his servant, and by his order, was his own possession.

Dyer, 253.
b. pi. 38.
3 Mod. 323.
S. C. cited.

So, where an officer of the customs made a deputy, who concealed the duties, and the master, being ignorant of the concealment, certified the customs of that part of the revenue into the Exchequer, upon oath; he was adjudged to be answerable for this concealment of his servant.

So,

So, where the lessor was bound, that the lessee should quietly enjoy; and it was found, that his servant by his command, and he being present, entered; this was held to be a breach of the condition, for the master was the principal trespasser.

Two are constituted postmasters-general by letters patent, pursuant to the statute 12 Car. 2. c. 35. and in the patent there is a power to make deputies, and appoint servants at their will and pleasure, and to take security of them in the name and use of the king; and that they, the postmasters-general, shall obey such orders as from time to time should come from the king; and as to the revenue, shall obey the orders of the treasury: and it is farther granted to them, that they shall not be chargeable for their officers, but only for their own voluntary faults and misbehaviour; and this granted with a fee of 1500*l. per annum*: And *A.* having Exchequer-bills, incloses them in a letter, directed to *B.* at Worcester, and delivers it at the post-office at London, into the hands of *J. S.*, who was appointed by the postmaster-general to receive letters, and had a salary; the letter having miscarried, and the Exchequer-bills lost, it was held by three judges (*a*), against *Holt*, C. J. that the postmasters-general are not liable; and this, from the multiplicity of servants they are obliged to employ, and against whom it is impossible for them to secure themselves, the inconsiderableness of the premium, &c.

Cowp. 754. in which case it was holden, that the postmaster was liable only for personal neglect or misconduct.]

It hath been held, that owners of ships were answerable to freighters for the acts of the masters and mariners, in the same manner as other masters are for their servants; and should answer for their embezzlements, secreting of goods, &c. But this proving a great discouragement to trade, by the 7 G. 2. c. 15. it is provided, that for such embezzlements, &c., without the owners knowledge, the owners shall only forfeit the value of the ship or vessel, with all her appurtenances, and the full amount of the freight due, or to grow, for and during the voyage wherein such embezzlement, &c.

The acts of a servant are deemed the acts of the master, in dealing and contracting for his master, in those things in which he has a general authority; as (*b*), if a servant usually buys for the master on tick, and the servant buys some things without the master's orders, yet, if the master were trusted by the trader, the master is chargeable, though the things never came to the master's (*c*) use.

(*b*) Show. 95. so ruled upon evidence, by *Holt*, C. J. (*c*) That coming to the master's use, clearly implies an authority from the master, and shall charge him. Brownl. 64.

But, if a man sends his servant with ready money to buy meat, or other goods, and the servant buys upon credit, the master is not chargeable.

So, if the master had forbidden the tradesman to trust his servant, this shall excuse the master on evidence.

And

4 Leon. 123.
Seaman and
Browning.
3 Mod. 323.
S. C. cited.
Caith. 487.
Salk. 17.
pl. 8. 143.
5 Mod. 455.
Ld. Raym.
646.
Comyns,
100. pl. 68.
Lane v. Robert Cotton
and Sir
Thomas
Frankland.
12 Mod. 482.
[(a) This
opinion of
the three
judges hath
since been
confirmed by
the decision
of the court
of K. B., in
Whitfield v.
Lord Le
Despencer,
Vent. 190.
233.
Raym. 220.
3 Keb. 72.
112. 135.
Mod. 85.
2 Lev. 69.
Morse v.
Sluce.
2 Salk. 440.
pl. 1.
Caith. 58.
3 Lev. 259. Bofon v. Sandford.
Doct. &
Stud.
Dial. 2.
c. 42.
2 Vern. 643.
Comb. 450.
1. Ld. Raym.
224.
3 Salk. 234.
pl. 4.
Show. 95.
Per Holt,
C. J.
Brownl. 64.

Ca. Law and
Eq. 110.

(a) A case
cited be-
tween Monk
and Clay-
ton, where
the act of a

servant though out of place, bound his master, by reason of the former credit given him by his master's service, the other not knowing that he was discharged.

2 Salk. 442.
pl. 4.

5 Mod. 398.

6 Mod. 36.

Ld. Raym.

928.

Com. Rep.

138. pl. 92.

Ward and Evans, *5* wide 10 Mod. 109, 110. 11 Mod. 72. (b) If a merchant's apprentice draws a bill in this manner, *I promise to pay such a sum for my master*; to charge the master with this note, it is said, there ought to be either an authority precedent, or a consent subsequent; or that the master had intrusted him with his affairs; otherwise the master shall not be chargeable. Comb. 450. Ld. Raym.

224. 3 Salk. 234. pl. 4.

Salk. 282.

pl. 11. ruled

by Holt; at

miss prius,

and the

plaintiff

non-suited

accordingly.

(c) That it a

carrier's

porter re-

ceives goods,

the carrier

shall be li-

able. Comb.

118. *Per*

Dolben, Justice.

— * Most, if not all, stage-coaches now carry goods for hire, and therefore come with-

in the description of carriers.

2 Salk. 441.

pl. 2. *per*

Holt, C. J.

at *miss prius*

at Guild-

hall. Ld.

Raym. 738.

Caf. temp. Holt, 642. pl. 3.

2 Salk. 441.

pl. 2. cited

Ld. Raym.

739.

2 Salk. 441.

pl. 2. cited.

Ld. Raym.

739.

Vent. 295.

2 Lev. 172.

3 Keb. 650.

Michael and

Alstree.

And herein it is said, that a servant, by transacting affairs for his master, does thereby derive a general authority and credit from him; which general authority is not liable to be (a) determined for a time, by any particular orders or instructions, to which none but the master and servant are privy; for that if this should prevail, there would be an end of all dealing, but with the master.

If a master sends his servant to receive money, and the servant instead of money takes a bill, and the master, as soon as told thereof, disagrees, he is not bound by this payment; but acquiescence, or any small matter will be (b) proof of the master's consent; and that will make the act of the servant the act of the master.

(b) If a merchant's apprentice draws a bill in this manner, *I promise to pay such a sum for my master*; to charge the master with this note, it is said, there ought to be either an authority precedent, or a consent subsequent; or that the master had intrusted him with his affairs; otherwise the master shall not be chargeable. Comb. 450. Ld. Raym.

If A. brings case against the master of a stage-coach, on the custom of the realm, for a trunk lost by his negligence; and on evidence it appears, that the trunk was delivered to the servant who drove the coach, who promised to take care of it, and that the trunk was lost out of his possession; the action does not lie against the master; for a stage-coachman is not within the custom as a (c) carrier is, unless he take a distinct price for the carriage of goods, as well as persons; and though money be given to the driver, yet that is a gratuity, and cannot bring the master within the custom; for no master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master; and then the act of the servant is the act of the master*.

* Most, if not all, stage-coaches now carry goods for hire, and therefore come within the description of carriers.

The master must also answer for torts and injuries done by his servant, in execution of his authority; as, where a pawnbroker's servant took a pawn, the pawner came and tendered the money to the servant, who said, he had lost the goods; upon which the pawner brought trover against the master, and it was held well.

So, where a servant of A. with his cart run against another cart, wherein was a pipe of sack, and overturned the cart, and spoiled the sack; it was held, that an action lay against A.

So, where a carter's servant run his cart over a boy; it was held, the boy should have his action against the master, for the damage he sustained by his negligence.

So, where the servant of A. brought a coach and two ungovernable horses of his master's to *Lincoln's-Inn-Fields*, a place much frequented by people, and there drove them to make them tractable, and fit them for a coach; and the horses being unruly, and for want of care, &c., run upon the plaintiff, and hurt and wounded him;

him; in an action brought both against the master and servant, it was held, that it well lay; and that it shall be intended the master sent the servant to train the horses there.

[It was lately ruled on the authority of the precedent in *Turberville v. Stampe*, 1 *Ld. Raym.* 264. 3 *Ld. Raym.* 375. that a declaration charging the *master*, the defendant, with having negligently driven his cart against the plaintiff's horse, was supported by evidence, that the *servant* drove the defendant's cart.]

Brucker v. Fromont, 6 Term Rep. 659.

(L) For what Acts of his shall the Servant himself answer to others.

IF a master command his servant to do what is lawful, and he misbehave himself, or do more, the master shall not answer for his servant, but the servant for himself, for that it was his own act; otherwise it would be in the power of every servant to subject his master to what actions or penalties he pleased. Skins. 228. pl. 7.

And on this foundation it hath been ruled, that if a man command his servant to do a lawful act, as to pull down a little wooden house, (wherein the plaintiff was, and would not come out, and which was carried upon wheels into the land, to trick the defendant out of possession,) and bid him take care that he hurt not the plaintiff; if, in doing this, the servant hurt the plaintiff, in trespass of assault and wounding brought against the master, he may plead not guilty, and give this in evidence; for that he was not guilty of the wounding, and the pulling down the house was a lawful act. Skins. 228.

But it is laid down as a rule, that, in every case where the master has not power to do a thing, whoever does it by his commandment is a trespasser as well as the master. 8 E. 4. 45. Per Choke.

If a master locks a man into his house, and delivers the key to his servant, if the servant be ignorant that any body be there, the servant is not chargeable; but if he know that the master had imprisoned one tortiously, and he still kept him in prison, he is liable to an action. 22 E. 4. 45. Per Jeany.

If the servant of a taverner sells wine that is corrupted (*a*), knowing it to be so, no action of deceit lies against the servant, for he did it but as a servant. Roll. Abr. 95. (a) If the attorney in an action

of debt knows of, and was witness to, a release of the debt, made before the action brought for it; yet no action lies against the attorney, for he acted only as a servant, and in the way of his calling. Mod. 209. [Sed. qu.]

If the servant of *A.* lease lands to another for years, reserving a rent to *A.*, and, to persuade the lessee to accept thereof, he promise, that he shall enjoy the land, during the term, without incumbrances; if the land be incumbered, &c., the lessee may have an action on the case against the servant, because he made an express (*b*) warranty. Roll. Abr. 95. 2 Roll. Rep. 270. Broking v. Came. (b) If one command his servant

to sell an ill horse, and the servant sell him for a good one, whereby the servant is arrested and indamaged; yet the servant shall not have his remedy against his master. *Cro. Jac.* 471. * *Qu.* If the servant did not know it was an ill horse? *

Yelv. 137.
Talbot v.
Godbolt.
(a) Whether
he who
speaks for
or fetches
goods for his
master,
without any
particular

promise of paying for them, is liable to pay for them; and where, upon the circumstances of such a case, though he may be held liable at law, a court of equity will relieve; *vide* Preced. Chan. 46. Abr. Eq. 308.

Mich.
7 G. 2. in
B. R. Tho-
mas v.
Bishop.
2 Kel. 136.
pl. 116. S.C.
2 Barnard.
K. B. 320.
S. C.
2 Stra. 955.
S. C.

If a man draws a bill, to which he puts his seal in this form: *Memorandum, That I have received of J. S., to the use of my master, the sum of 40l., to be paid at Michaelmas following*; the servant is liable hereby, for though in the premises it is said to be to the use of his master, yet the payment being indefinite, must be understood to be by him who sealed the bill: but it is said, that if it had been to be repaid by his master, that (a) the servant had not been liable.

So, Mr. *Mildmay*, agent to the *York Buildings Company*, residing in *Scotland*, drew a bill of exchange in favour of *J. S.*, on their cashier in *London*; which bill run thus: "To — *Bishop*, Cashier to the "Honourable Governor and Assistants of the *York Buildings Com-* pany, at their house in *Winchester-street*. Sir, pray pay to *J. S.*, or "his order, 200 *l.*, and place it to the account of the Company for "value received, as *per* advice, by your humble servant, *Charles* "Mildmay." The letter of advice referred to, was directed to the governor and company, informing them of the draught made upon Mr. *Bishop*, in favour of *J. S.* (but it did not appear that this was the usual method of drawing bills on the company); Mr. *Bishop* accepted the bill generally, *viz.* Accepted by *J. Bishop*; and if this acceptance should charge him in his own right, was the question? It was saved for the judgment of the court, after a verdict at *nisi prius* for the plaintiff; and it was resolved it should.

(M) For what Acts of his shall the Servant answer, and be responsible to his Master: And herein,

1. Where by an implied Trust or Confidence a Servant shall answer in a Civil Action.

8 Co. 84.
& *vide* tit.
Bailment.

IF a man commits money to his servant to carry to such a place, and he is robbed, the servant shall not answer for it; for a servant only undertakes for his diligence and fidelity, and not for the strength and security of his defence, and therefore shall not be obliged to preserve his master's property at all adventures. And herein the law, as now settled, makes a difference between a servant and another independent person; for every other person has naturally no more than the single care of his own affairs; and is not bound in point of duty to defend or intermeddle with the property of another; but where he will officiously create to himself such an undertaking, he is obliged to answer the loss, if any happen; but a servant is, by the duty of his place, under the command of his master, and is bound, in point of necessity, to take care of another's affairs. Now the first contract, whereby he becomes a servant, implies no more than an undertaking for his care and obedience; and whenever he afterwards intermeddles in the affairs

affairs of his master, it is but in consequence of that original contract, and therefore cannot be extended any further; and since, when he first contracted, it was no more than an undertaking for his own care and fidelity, whenever he intermeddles with his master's affairs, it is under that general undertaking, and, by consequence, he cannot be charged but for deficiency, in point of care, or of faithfulness; and therefore is not answerable for any inevitable accident.

But if *A.* is employed by *B.* to sail from *England* to the *Indies*, and *A.* covenants, that he or his servants will not thence import any callicoos, &c., and *A.* retains *C.* as his servant in this voyage, and acquaints him with the covenants, and notwithstanding *C.* falsely and fraudulently brings thence certain callicoos, &c., *A.* shall have an action against *C.*, for though no action lies by a master for the bare breach of his command, yet, if a servant does any thing falsely and fraudulently, to the damage of his master, an action will lie.

So, if a merchant's servant takes his master's goods that are arrived at a port in *England*, and, before payment of the customs, lands them, *per quod* the goods are forfeited and seised by the king; the master may have an action of trespass upon the case against his servant.

So, if a servant, that drives his master's cart, by his negligence suffers the cattle to perish, an action upon the case lies against him.

If a man deliver a horse to his servant to go to market, or a bag of money to carry to *London*, which he neglects to do, the master may have an action of account or detain against him.

A master sends his servant, that used to transact affairs of that nature for him, on *Saturday* morning with a note drawn upon Sir *Stephen Evans*, with order to get from Sir *Stephen* either Bank-bills or money, and turn them into Exchequer-notes; but the servant having other business of his master's upon his hands, to save himself the time and trouble of going to Sir *Stephen*, goes to *B.* and prevails with him to give him a Bank-bill for Sir *Stephen's* note, and then in pursuance of his master's orders invested it in Exchequer-notes, which he brought to his master, not letting him know but that he had gone to Sir *Stephen*; Sir *Stephen Evans* failing on the *Monday* following, it was adjudged, that this loss should fall on the master, and not on *B.*; and the court was of opinion, that the master could not recover it of the servant, the loss being occasioned by a mere accident, and not by either folly or negligence.

2. Where Servants or Apprentices shall be punished criminally, for Acts done in relation to their Masters.

At common law, a servant or apprentice, without any regard to age, might be guilty of felony in feloniously taking away the goods of their master, though they were goods under their charge, as a shepherd, butler, &c., and may at this day for any such offence

Sid. 298.
Lev. 138.
2 Keb. 88.
Huffey and
Pacey.

Roll. Abr.
105. Cro.
Jac. 265.
Lane, 65.
S.C. Leveson
v. Kirk.

7 H. 4. 14.
Bro. tit.
Action sur
Case, 34.
21 H. 4. 14.
Moor, 248.

10 Mod. 109.
Nixon v.
Brohan.

Hale's Hist.
P. C. 505.
666.

offence be indicted, as for a felony at common law ; but at common law, if a man had delivered goods to his servant to keep or carry for him, and he carried them away *animo furandi* ; this was considered only a breach of trust, but not felony.

But now by the statute of 21 H. 8. c. 7. it is enacted, " That
 " all and singular servants, to whom any caskets, jewels, money,
 " goods, or chattels, by his or their masters or mistresses, shall
 " from henceforth be delivered to keep, that if any such servant
 " or servants withdraw themselves from their masters or mistresses, and go away with the caskets, jewels, money, goods, or
 " chattels, or any part thereof, to the intent to steal the same,
 " and defraud his or their masters or mistresses thereof, contrary
 " to the trust and confidence to him or them put by his or their
 " masters or mistresses, or else being in the service of his or their
 " masters or mistresses, without any assent or commandment of his
 " master or mistress, embezzle the same caskets, jewels, money,
 " goods, or chattels, or any part thereof, or otherwise convert the
 " same to his own use, with like purpose to steal it ; that if the
 " said casket, jewel, money, goods, or chattels, that any such
 " servant shall go away with, or which he shall embezzle, with
 " purpose to steal as aforesaid, be of the value of 40*s.* or above,
 " that then the same false, fraudulent, or untrue act and
 " demeanor, shall from henceforth be deemed and adjudged
 " felony, &c. Provided it extend not to apprentices, nor to any
 " person under the age of *eighteen* years ; but every such apprentice, or person within that age, doing that act, shall be, and
 " stand in the like case, as they were before the making of this
 " act."

Hale's P. C.
666-7.

By the act of 27 H. 8. c. 17. clergy was taken away in this case, if the indictment were laid specially upon the act of 21 H. 8. c. 7. and pursuant to the same, and by the act 28 H. 8. c. 2. this act of 21 H. 8. c. 7. was made perpetual ; but by the act of 1 E. 6. c. 12. these acts were both repealed ; but again, by the act of 5 Eliz. c. 10. § 3. this act of 21 H. 8. c. 7. was re-enacted and made perpetual ; but it did not revive the act of 27 H. 8. c. 17. for taking away clergy. But now by 12 Ann. c. 7. clergy in such case is taken away from facts committed in any house or out-house, except as to apprentices under the age of *fifteen* years robbing their masters.

In the construction of this statute the following opinions have been holden :

Hawk. P. C.
c. 33. § 12.

1. That it extends only to such as were servants to the owner of the goods both at the time they were delivered, and also at the time when they were stolen.

Dyer, 5. pl.
2, 3. 3 Inst.
105. Hawk.
P. C. c. 33.
§ 13. (a) Or
the master's
wife, she
being as well
his mistress
as if she were

2. That it is strictly confined to such goods as are delivered *to keep* ; and therefore that a receiver, who having received his master's rents, runs away with them, or a servant, who being intrusted to sell goods, or to receive money due on a bond, sells the goods, &c. and departs with the money, is not within the statute ; but that a servant who receives his master's goods from another (a) servant, to keep for the master, is as much guilty as if he had received

received them from the master's own hands; because such a delivery is looked upon as a delivery by the master.

sole. Hale's
Hist. P. C.
668.

3. That it includes not the wasting or consuming of goods, howsoever wilful it may be; nor the taking away of an obligation, or any other bare *chase in action*.

Hawk. P. C.
c. 33. § 14.

4. That it extends not to the taking of such things, whereof the actual property is not in the master at the time; and therefore, that if a servant having money or corn, &c. delivered to him, melt down the money of his own head, without the command of his master, into a piece of plate, or turn the corn into malt, and then run away with them, that he is not within the statute; because the property of these things is so far changed, by altering them in such a manner, that they cannot be known again, and the master cannot afterwards take them, without being a trespasser. But it is agreed, that if a servant make a suit of clothes of cloth, or a pair of shoes * of leather, delivered to him by the master, and then run away with them, that he is not within the statute; because the property is no way altered; and even in the first case, *Hawkins* seems to be of opinion, that the taking of the plate and malt is within the statute; and that the whole act of the servant, taken together, should be deemed a conversion of the master's goods to his own use, with an intent to steal them, which brings it within the express letter of the statute; on which foundation it hath been resolved, that a servant who changes his master's money from silver to gold, and then runs away with it, is within the statute.

Crompt. 50.
Dalt. c. 102.
Hawk. P. C.
c. 33. § 15.

* How can a pair of shoes be within the statute, if the leather was not of the value of 40s. which is not very probable?

[By 15 G. 2. c. 13. § 12. "if any officer or servant of the Bank of England, being intrusted with any note, bill, dividend, warrant, bond, deed, or any security or effects of any other person lodged or deposited with the said company, or with him as an officer or servant of the said company, shall secrete, embezzle, or run away with the same, or with any part thereof, he shall suffer death without benefit of clergy."

By 5 G. 3. c. 35. § 17. and 7 G. 3. c. 50. "if any deputy, clerk, agent, letter-carrier, post-boy, or rider, or any other officer or person whatsoever, employed in receiving, stamping, sorting, charging, carrying, conveying, or delivering letters or packets, or in any other business relating to the post-office, shall secrete, embezzle, or destroy any letter, packet, or bag of letters, which he shall be intrusted with, or which shall have come to his possession, containing any bank-note, bank post-bill, bill of exchange, Exchequer-bill, South-sea or East-India bond, dividend warrant, navy, or victualling, or transport bill, ordnance debenture, seaman's ticket, state-lottery ticket or certificate, Bank receipt for payment on any loan, note of assignment of stock in the funds, letter of attorney for receiving annuity or dividends, or for selling stock in the funds, or belonging to any company, society, or corporation, or of the Bank, South-sea, East-India or any other company, or society, or corporation, American provincial bill of credit, goldsmith's or banker's letter of credit, or note for or relating to the payment of money or
" other

“ other bond or warrant, draught, bill, or promissory note what-
 “ soever for the payment of the money, or shall steal and take any
 “ of the same out of any letter or packet that shall come to his
 “ possession, he shall suffer death without clergy.”

By 7 *Ja.* 1. c. 7. and 17 *G.* 3. c. 56. “ persons employed in the
 “ hat, woollen, linen, fustian, cotton, iron, leather, fur, hemp,
 “ flax, mohair, silk, or dying manufactures, who shall embezzle
 “ or clandestinely dye any of the materials with which they are
 “ intrusted, and any persons who shall knowingly buy, sell, pawn,
 “ or dispose of the same, shall be liable to be punished by fine,
 “ whipping, and imprisonment.”]

(N) Of the Master's Authority over his Servant, and how far he may correct and punish him.

38 *H.* 6. 25. **I**T is clearly agreed, that a master may correct and punish his
 Sid. 175. servant in a reasonable manner for abusive language, neglect of
 (a) It is said, duty, &c., and that in an action of assault and battery brought
 that the against him, he may justify, that he was (a) his servant, gave pro-
 master in his voking language, &c., and that therefore *moderate castigavit*; and
 justification must set on issue of (b) *immoderate castigavit*, if it appears in evidence, that
 forth the re- the punishment was such as is usual from masters to their servants,
 tainer, the the master will be acquitted.
 place where, business, being matters issuable. Sid. 177. (b) Where the plaintiff replied *non moderate castigavit*,
 and in what held well, though not so pertinent an issue as *immoderate castigavit*. Vent. 70. Sid. 444. 2 *Keb.* 623.

2 *Mod.* 167. But as such correction must be moderate, it has been held, that
 3 *Mod.* 120. the master cannot justify wounding his servant; as, in assault,
 218. 330. battery, wounding, and imprisonment, &c., defendant justifies,
 21 *H.* 6. 26. for that he and the plaintiff were servants to the sheriff of
 2 *Inst.* 316. *Suffolk*; and that the plaintiff, when he should have been attending
 * He shoud in court, was at a conventicle; and that he, by command of
 have pleaded the sheriff, *levitè & mollitè manus imposuit* upon the plaintiff,
 not guilty to the wound- and brought him thence; which is the same trespass, &c. On
 ing, and now demurrer to this plea it was held ill; because as to the wound-
 in such case, ing * he says nothing at all, and in that he cannot justify.
 by virtue of the stat. 4 *Ann.* c. 16.
 § 4. the defendant may plead double, not guilty to the whole, and justify as to a part of the trespass.

2 *H.* 4. 4. Also it hath been held, that, though a master may beat his ser-
 11 *H.* 4. 75. vant, yet he cannot delegate that power to another; for though a
 9 *Co.* 76. a. lord might beat his villein, either with cause or without, and he
 2 *Mod.* 167. could have no remedy, yet if another by his command did it, the
 villein might have had an action.

Hale's Hist. From this authority which a master hath over his servant, it is
 P. C. 454. held in law, that if a master designeth moderate correction to his
 servant, and accordingly useth it, and the servant, by some misfor-
 tune, dieth thereof, this is not murder, but *per infortunium*; be-
 cause the law alloweth him to use moderate correction; and
 therefore the deliberate purpose hereof is not *ex malitiâ pra-*
cogitatâ.

But

But if the master design an immoderate or unreasonable correction, either in respect of the measure, or manner, or instrument thereof, and the servant die thereof; this *per* (a) *Hale* cannot be excused from murder, if done with deliberation and design; nor from manslaughter, if done hastily, passionately, and without deliberation; and herein, says he, consideration must be had of the manner of the provocation, the danger of the instrument which the master useth, and the age or condition of the servant that is stricken; and the like of a schoolmaster towards his scholar.

(a) 1 *Hale's* Hist. P. C. 454. And *per* *Hawkins*, where a school-master in correcting his scholar, or a father his son, or a master his servant, or

an officer in whipping a criminal condemned to such punishment, happens to occasion his death, if such persons in their correction be so barbarous as to exceed all bounds of moderation, and thereby cause the party's death, they are guilty of manslaughter at the least; and if they make use of an instrument improper for correction, and apparently endangering the party's life, as an iron bar, or sword, &c., or kick him to the ground, and then stamp on his belly and kill him, they are guilty of murder. *Hawk. P. C. c. 29. § 5.* for which are cited *Bracton*, lib. 1. c. 4. *H. P. C. 31.* *Cromp. 28.* *Dalt. c. 96.* *Keilw. 136.* *Kelyn. 65.* *5 Mod. 287.* *Fost. Cr. Law, 262.*

(O) Of the Master's Remedies against others for enticing away, and other Injuries done in relation to his Servant.

IT is clearly agreed, that from the interest a master has in the labour and service of his servant, he may maintain an action for inciting (b) or taking him away.

taking away a man's servant out of his actual service, trespass will lie; but that for enticing him, only an action on the case. *Salk. 380. pl. 17.* 2 *Ld. Raym. 1116.*—[Trespass will lie for enticing him away; and this though he be only a journeyman. *Hart v. Aldridge, Cowp. 54.*]

21 *H. 6. 31.* pl. 18.

(b) But it is said, that for

Also, if without any enticement a servant leave his master, without licence or just cause, and *J. S.* knowing him to be his servant, retain him, an action lies.

Noy, 10.

106.

Leon. 240.

Keilw. 180. 2 *Lev. 63.*

But it hath been held, that an indictment does not lie for enticing away a servant, being a private injury, which may be redressed by civil action.

Salk. 380.

pl. 17.

3 *Salk. 191.*

Queen v. Daniel.

In case the plaintiff declared, that *J. S.* 19 Sep. 16 Car. 2. was retained as an apprentice to serve the plaintiff for nine years, and continued in his service till the 31st of October 21 Car. 2. when the defendant procured the said *J. S.* to leave the plaintiff's service, &c. (c) *per quod* the plaintiff *totum proficuum quod ratione servitii prae*. *J. S. per totum residuum termini recipere potuisset totaliter perdidit*, &c. and after (d) a verdict for the plaintiff, and general damages given, though it appeared the term was not expired, it was intended that damages were given for all the term, as well the time to come as past; for the damages must be intended to be taxed according to the declaration; and if it should be intended otherwise, it would be uncertain to what time they were taxed, whether to the exhibition of the bill, or verdict given; and judgment arrested accordingly.

T. Raym.

200.

2 *Saund.*

169, 170.

Lev. 299.

Hambleton

v. Veere.

(c) The

plaintiff de-

clared for a

battery of

his servant,

19 Jan. &c.,

per quod he

lost his ser-

vice for a

long time,

viz. for the

space of six

months then next following, &c. After a verdict for the plaintiff, though the original bore *16se* before the end of the six months, yet the plaintiff had his judgment; for the viz. was more than needed, being not of the substance of the action, but for aggravation of damages only. *Hob. 284.* All. 23. *per cur.*; but yet *vide* *Cro. Jac. 619.* *Yelv. 94.* (d) Where upon a demurrer it may be helped, for the plaintiff may take damages for the departure only. *Mod. 271.* pl. 22.

And. 17. For the battery of a servant, the master as well as servant may
 9 Co. 113. bring an action, and each shall recover damages, for both are in-
 10 Co. 131. jured; the servant in his person, and the master (a) by the loss of
 Style, 94. his servant's labour; and therefore a recovery in an action brought
 2 Bullt. 158. by one of them, cannot be pleaded in bar to an action brought by
 Sid. 175. the other.
 (2) And as it is this that

entitles the master to his action, he must always declare *per quod servitium amisit*. Cro Jac. 618.
 Roll. Rep. 393. — And therefore the defendant may plead not guilty, and give it in evidence, that
 he did not lose his service. 2 Roll. Abr. 682.

Yelv. 89, 90. But if a man beats another's servant to that degree that he dies
 Brownl. 205. thereof, the master loses his action, and must proceed by indict-
 2 Roll. Abr. ment; for the private injury to him is drowned in the general
 568. injury to the publick.

Roll. Abr. If a surgeon, in consideration of a sum of money, undertakes to
 98. Roll. cure my servant of a hurt, and he applies unwholesome medicines
 Rep. 124. thereto, on purpose to make the wound worse, by which I lose
 2 Bullt. 332. the service of my servant for a long time, I may have an action on
 the case against the surgeon.

3 Eurr. [If a daughter, who is under age, and lives with her father, be
 1878. seduced, the father may maintain an action against the seducer to
 3 Will. 18. recover a compensation for the loss of her service; and he may do
 2 Term so, whatever be her age, if she lived with him at the time, and acts
 Rep. 166. of service be proved: and the slightest acts of service will suffice.]

(P) What a Master or Servant may justify doing in each other's Defence.

Hale's Hist. FROM the relationship between a master and servant it hath
 P. C. 484. been agreed, that a master killing a person in defence of his
 servant, or a servant in defence of his master, are not guilty of
 murder, and that in those cases, the act of the assistant shall have
 the same construction, as the act of the party assisted should have
 had, if it had been done by himself.

2 Roll Abr. Also, a servant may justify an assault in defence of his (b) master;
 546. and by some opinions, so may a master in defence of his servant; but
 Owen, 151. others hold that he cannot; because in such case he may have an
 Cont. 8 lk. action *per quod servitium amisit*.
 407. pl 2.

(b) But he cannot justify in defence of his master's son, because not servant to him. Dalt. c. 72. Crompt. 136.
 Nor in defence of his master's goods. 2 Lutw. 1481.

Roll. Abr. A servant shall not avoid a deed made by duress to his master,
 687. nor *vice versa*.

2 Brownl. 276. As to a master's maintaining a servant, or a servant his master,
 Bro. Main- in suits and legal proceedings, it is agreed, that a master may go
 tenance, 6. along with his servant, or with his domestick chaplain, to retain
 14. 2 Roll. counsel: also, he may pray one to be of counsel for him, and may
 Abr. 116. go with him, and stand with him, and aid him at the trial, but
 Moor, 814. ought not to speak in court in favour of his cause: also, if the ser-
 vant be arrested, the master may assist him with money to keep him
 from prison, that he may have the benefit of his service; but the
 master cannot safely lay out money for the servant in a real action,

unless he have some of his wages in his hand; but these, with the servant's consent, he may safely disburse.

As to a servant's maintaining his master, it is agreed, that a person retained generally as a servant, and not for a particular occasion only, may lawfully ride about to speed his master's business; and may go to counsel for him, and shew his evidence to the counsel, or to the jury, and stand by him at a trial; but cannot lawfully lay out his own money in the suit.

Hetl. 79.
2 Roll. Abr.
116.
Keilw. 50.

Merchant and Merchandize.

[THE protection of trade was very early a favourite object of the laws of this country. In the time of King *Atthelstan* we find a very remarkable law, which says, that any merchant who has made three voyages upon his own account, beyond the *British* channel, or narrow seas, shall be entitled to the privilege of a thane. *Et si mercator tamen sit, qui per trans altum mare per facultates proprias abeat, ille postea jure thani sit dignus.*]

Wilkins
Angl. Sax.
Leg. Juuicia
Civitas
Lond. p. 71.

It seems agreed too, from the fundamental principles of our government, that the king cannot regularly prohibit trade, nor lay a penny imposition on it; but that every man may use the sea, and trade with other nations, as freely as he may use the air.

And this freedom of trade is not only allowed by the common law, but hath also been asserted and established by the care and wisdom of princes and parliaments; and to this purpose it is provided by *magna charta*, c. 30. That (a) all merchants, (b) if they were not openly prohibited before, shall have their safe and sure conduct to depart, come and carry, buy and sell, without any manner of evil tolts, by the old and rightful customs, &c.

(a) This respects aliens only; which strongly proves that the English had this liberty before; or heretofore they

would not have extended it to aliens, and left the English without it. 2 Inst. 57. (b) This prohibition must be by act of parliament, because it concerns the whole realm, which is implied in the word *openly*, and relates to aliens only. 2 Inst. 57.

But notwithstanding this freedom of trade, yet it seems agreed, that the king may in time of war, and for the publick service and safety, lay an embargo on ships, and employ the ships of his subjects in the publick service; but this, says my Lord Chief Justice *Holt*, ought to be upon great emergencies, and for the publick benefit, and not for the private interest of any person or society: also it seems agreed, that the king may, by his writ of *ne exeat regno*, retain a subject from going out of the realm; and may by his privy seal command any of his subjects to return out of a foreign nation, on pain of having their lands seised, &c. It hath likewise been holden, that the king by his prerogative may restrain his subjects from trading with an infidel nation, state, or people,

Skin. 335.
3 Lev. 352.
4 Mod. 176.
Sand's v.
Child and
Lynch.

without his licence; and on this foundation principally it was held, in the case of *Sands and The East-India Company*, that the king's charter, which gave them an exclusive right to trade to the *East-Indies*, was good. But this doctrine seems now exploded, for nothing can exclude the subject from trade, but an act of parliament.

2 Roll.
Rep. 113.
Yelv. 135.
3 Mod.
226-7.
Show. 127.
Molloy,
418.

[(a) These customs were first established to supply the want of laws, and afterwards admitted as laws.]

(b) There

are four sorts of merchants, *viz.* merchants adventurers, merchants dormant, merchants travelling, and merchants residents. 2 Brownl. 99. *per* Coke.—But it is said, that a merchant includes all sorts of traders, as well and as properly as merchant adventurers; and that a merchant taylor is a common term. 2 Salk. 445. *per* Holt; & *vide* head of Bankrupts.

Carth. 82.

2 Vent. 293.
Show. 127.
Comb. 45.
Sarfield v.
Witherly.

It hath been adjudged, that a gentleman who is abroad on his travels, and draws a bill of exchange, makes himself a merchant within the custom as to this special purpose, to make him responsible to the party upon non-payment; and this the rather from the inconveniences that might ensue, and the suspicion that might increase amongst foreign merchants upon bills of exchange, if persons who took upon themselves to draw such bills should not be liable to the payment thereof.

(c) The custom of merchants is part of the common law

But as the laws and customs of merchants are of various kinds, and most of them chiefly known (c) to merchants themselves, we shall here only insert what we find in our law-books relating to the following heads:

of this kingdom, of which the judges ought to take notice; and if any doubt arise to them about the custom, they may send to the merchants to know their custom, as they may send for the civilians to know their law. Winch. 24.—May direct an issue for trial of a custom among merchants. Hard. 486.* —* The law of merchants cannot be proved by witnesses, for it is the law of the land. *Pillan v. Van Microp.* 3 Burr. 1663.

(A) Of Alien Merchants.

(B) Of Principals and Factors.

(C) Of Partners and Joint-Traders.

(D) Of Owners and Masters of Ships.

(E) Of Mariners.

(F) Of Average.

(G) Of

- (G) Of Hypothecation.
- (H) Of Charter-Parties.
- (I) Of Policies of Insurance: And herein,
 - [1. Of Marine Insurances.
 - 2. Of Insurances upon Lives.
 - 3. Of Insurances against Fire.]

(K) Of Bottomry [and Respondentia].

[(L) Of Bills of Lading.]

(M) Of Bills of Exchange.

[(N) Of the Provisions for the Encouragement of Shipping and Navigation.]

(A) Of Alien Merchants.

ALTHOUGH, by the policy of our constitution, aliens lie under several disabilities, and are denied in many instances the benefits of our laws; yet are they (a) here, as in most other countries, allowed to trade and merchandize, which privilege is confirmed to them by (b) *magna charta*, and (c) divers other acts of parliament.

disability of aliens; because the shutting out of aliens tends to the loss of people, which, laboriously employed, are the true riches of any country. Vent. 427. *per* Hale, C. J.—The king pardons his loving and obedient subjects; this extends to aliens, if here at the time, though not made denizens. *Per* Hob. 271. (b) For this *vide supra*, and 2 Inst. 57. Molloy, 417. (c) By the 2 E. 3. c. 9. merchant strangers and others shall go and come with their merchandize.—By 9 E. 3. c. 1. all merchant strangers and others may freely buy and sell their commodities from whencesoever they came without interruption, notwithstanding charters or usage to the contrary, which charters or usage (if any be) the king, lords, and commons hold to be of no force, as being to the damage of the king and his great men, and to the oppression of the commons, &c.

And as foreigners and aliens are allowed to trade amongst us, so are they allowed to maintain personal actions; because, otherwise they would be incapacitated to merchandize: but they cannot maintain any real action, because it is not necessary that they should purchase lands, or settle amongst us.

An alien merchant may upon a statute extend lands, and upon office the king shall not have them; and upon ouster he shall have an assize; for the main end and design of both the statute staple and merchant was to promote and encourage trade, by providing a sure and speedy remedy for merchant strangers, as well as natives, to recover their debts at the day assigned for payment.

So, an alien (d) merchant may take a lease of a (e) house for his habitation for years only, and this also is for the encouragement of commerce: for if an alien trade, he must have an abode amongst us; but if he (f) depart the kingdom, or die, it goes to the king, not to his executors or administrators, because it was

Vide tit. Alien.
(a) The law of Eng. land rather contracts than extends the

Co. Lit. 129. b.
And. 25.
Dyer, 2. b.

11 E. 3. Rot. 87.
Dyer, 2. b. in margine.

Co. Lit. 2. b.
(d) That he must be a merchant.
Poph. 36.
Roll. Abr.

194.—For only a personal privilege annexed to the alien as a merchant, for the encouragement of merchandize, and consequently must expire with him, without going to his executors or administrators.
 shop, made to alien artificer or handicraftman, are void by 31 H. 8. c. 16. § 13. and the person taking such lease forfeits 100 *l.*, and the person letting 100 *l.* for which *vide* Sid. 308, 309, 357. 2 Keb. 102. 116. 118. Sand. 6. 8. 2 Keb. 315. 3 Mod. 94. (c) But he cannot take a lease for years of land, meadow, &c., not being necessary for his trade or traffick. Co. Lit. 2 b. 7 Co. 17. Dyer, 2. b. cont. And. 25. Bendl. 56. By 27 E. 3. c. 2. it is enacted, that all merchant strangers, and not enemies, may safely dwell in the realm, &c.; upon which statute, at a reading in Lincolns-Inn, 35 Eliz. it was agreed a merchant alien might take a lease of a house with gardens at will, but not for years; *per* Dyer, 2. b. in margin. (f) Not if he goes beyond sea, and leaves servants in his house during his absence. Dyer, 2. b.

Yelv. 198.
 Bulf. 134.
 S. C.

A merchant stranger shall have an action for saying he is a bankrupt, for by law he may have personal actions; and these words tend to impair his credit in his trade.

Also, by the 21 *Jac.* 1. c. 19. it is provided, that that act, and all other acts heretofore made against bankrupts, shall extend to strangers born, as well aliens as denizens, as effectually as to natural-born subjects, both to make them subject to the laws as bankrupts, as also to make them capable of the benefit or contribution as creditors by these laws.

Lit. Rep. The sons of an alien, though born here, being merchants, for the first generation shall pay alien (a) customs and duties: said to be the practice of the Exchequer.
 140. Hard.
 335. S. P.
 (a) For this
vide Molloy, 305. 322.

Palm. 14.

But though alien merchants, in the payment of customs and otherwise, lie under some disadvantages different from natural subjects; yet in other respects are they said to have advantages above them; in that by the common law an action of account lay for a merchant stranger against executors; that a defendant could not wage his law to an action of debt brought by a merchant stranger, and that merchant strangers were not to be sworn in leets, &c.

7 E. 4. 13,
 14. Bro.
 tit. Pro-
 perty, 38.
 2 Inst. 58.
 Molloy,
 417, 418.
 Skin. 204.

As to merchant strangers, whose prince is in war with the crown of *England*, if they are found within the realm at the beginning of the war, they shall be attached with a privilege and limitation without harm of body or goods, until it be known to the king, how merchants of *England* are used and entreated in their country, and accordingly they shall be used in *England*, the same being *jus belli*; but for merchant strangers that come into the realm after war begun, they may be dealt withal as open enemies.

Salk. 46.
 pl. 1. Ld.
 Raym. 282.
 Wel's v.
 Williams.
 (b) But an
 alien enemy
 who has
 such pro-
 tection,
 must plead

If an alien enemy comes here *sub salvo conductu*, he may maintain an action: so, if an alien amy comes hither in time of peace, *per licentiam domini regis*, as the *French* protestants did, and lives here *sub protectione*, and a war afterwards happens between the two nations, he may maintain an action; for suing is but a consequential right of protection; and therefore an alien enemy, that is here in peace under (b) protection, may sue upon a bond; *aliter* of one commorant in his own country*.

it. 7 Mod. 150. Sylvestre's case. Ld. Raym. 283. 853. 2 Stra. 1032. —* By stat. 14 G. 3. c. 84. Persons naturalized shall not have British privileges of trade in foreign countries, unless they shall have resided seven years in British dominions, without being above two months absent at a time.

[But

[But no action can be maintained by or in favour of an alien enemy. Therefore it was adjudged, that alienage was pleadable to an action on a policy of insurance brought in the name of an *English* agent for his principal an alien enemy, such interest appearing on the record; and that a replication to such a plea, that the alien was indebted to the agent (the plaintiff) in more money than the value of the property insured could not be supported.]

Brandon
v. Neib 17,
6 Term
Rep. 23.

(B) Of Principals and Factors.

AS no one person, whose trade is extensive, can transact all his own affairs; so it is necessary for him to depute another in his place, on whose ability and honesty he can rely; and such person so deputed is called a factor, who is in nature of a servant, whose acts shall bind his master or principal, so far as he acts pursuant to the authority given him.

Molloy,
421.

If the commission be general, as to *dispose, do, and deal therein as if it were your own*, hereby the factor is excused if a loss happens; but if the commission be to *sell and dispose*, hereby the factor is not enabled to sell upon tick, nor can he sell for an unreasonable time, as ten or twenty years, though there be the words *as if it were your own*, but he must sell according to the usual time, for which credit is given for the commodities he disposes of.

Molloy,
422.
Bulf. 103.

If in account the defendant pleads before auditors, that the goods for which he is to account were *bona peritura*, and notwithstanding his care in keeping them, grew worse, and that they remained in his hands for want of buyers, and were in danger of growing worse, and that therefore he sold them upon credit to a man beyond sea; this is no good plea, for a factor cannot sell, even *bona peritura*, upon (a) credit, without a particular commission so to do.

2 Mod. 100.
adjudged.
(a) It is the
common
practice to
give factors
power to
sell upon
credit.
Bulf. 101.

In favour of trade and merchandize, an action of account lies at common law against a factor as against a bailiff, in which he shall have all (b) reasonable allowances.

2 H. 4. 12. b.
Co. Lit. 90.
b. 172. a.
11 Co. 90. a.

F. N. B. 117. 2 Roll. Abr. 161. (b) Therefore it is a good discharge before auditors for a factor to say, that in a tempest, because the ship was furcharged, the goods were cast overboard into the sea. Roll. Abr. 124. Bro. tit. Account, 10.—So, that he was robbed of the goods without his default or negligence. Co. Lit. 89.—So, that he durst not buy for fear of loss. Roll. Abr. 124.

Also, if a man by obligation acknowledges that he has received money *ad proficiendum & computandum*, the obligee may either sue the (c) bond, or have an action of account at his election.

Roll. Abr.
118. Dyer,
20. Cro.
Eliz. 644.

(c) Where a man covenanted to render a true account, &c., and held that an action of covenant lay on the deed. Roll. Rep. 52. 2 Bulf. 256.—So, an *assumpsit* will lie on a promise to dispose of goods, and to give an account thereof. Salk. 9. pl. 1. Carth. 89. Comb. 149.—But where the demand is of consequence, and the matter of an intricate nature, it is most usual to resort to a court of equity, where matters of account are most commodiously adjusted, and more advantageously determined for both parties; the plaintiff being in that court entitled to a discovery of books, papers, the defendant's oath, &c. *Vide* tit. Account.

If goods are consigned to a factor, and upon arrival he makes a false entry at the custom-house, or lands them without paying the customs, whereby they become forfeited and are seized, whatever

Molloy,
423. Cro.
Jac. 265.
Lan. 65.

the principal hereby suffers, the factor must inevitably make good, although his commission was general; but if the factor makes his entry according to the invoice, or his letter of advice, and it falls out the same are erroneous, though the goods are lost, yet is the factor excused.

Chan. Ca. 25. Smith v. Oxenden. Two merchants, having certified the customs to be so against two others, who held that the benefit belonged to the principal. Chan. Ca. 76 S. P. and Skin. 149. S. P. so held to have been determined by Lord Clarendon. — But North, L. K. said, he was not satisfied herewith, for that though in the saving the customs the factor ventured his own life, yet the principal's goods were ventured also.

Chan. Ca. 30. Boer v. Landall. But if a home factor be brought to account, he shall not be allowed the customs, unless he swear that he hath paid them; because it were a matter of great scandal, that any thing should pass the allowance of a court of justice, that is gotten by defrauding the government.

Molloy, 423. & vide tit. Master and Servant. The principal shall answer for his factor in all cases where he is privy to the act of wrong; and so in contracts, if a factor buy goods on the account of the principal, especially where he has been used so to do, the contract of the factor will oblige the principal to a performance of the bargain.

Bridgm. 125, 126. Cro. Jac. 469. 2 Roll. Rep. 5. 26. Poph. 143. Southern v. Haw. But if *A.* being possessed of certain artificial and counterfeit jewels of the value of 168*l.*, and knowing them to be such delivers them to *B.* his servant, commanding him to transport the said jewels to *Barbary*, and to sell them to the king of *Barbary*, or to such other person as would buy them, but gives *B.* no charge to conceal their being counterfeit, and thereupon *B.* goes into *Barbary*, and knowing these jewels to be counterfeit, shews them to *C.* for good and true jewels, and affirming to *C.* that they were worth 810*l.*, desires *C.* to sell them to the said king; whereupon *C.* does sell them to the said king for 810*l.*, which money *C.* pays *B.*, and *B.* thereupon immediately returns to *England*, and pays the 810*l.* to *A.* his master; and after the jewels being discovered to be counterfeit, *C.* is imprisoned by the said king till he repays the 810*l.* out of his own effects; of all which matter *C.* gives notice to *A.*, and demands satisfaction, &c., yet no action lies against *A.*, for jewels are in themselves of an uncertain value, and *B.* was not by *A.* particularly directed to *C.*, and all that was done *quoad C.* was the voluntary act of the servant, for which the master is not bound to answer.

Salk. 160. pl. 13. Whitcomb v. Jacob. It hath been ruled in equity, that if one employs a factor, and intrusts him with the disposal of merchandize, and the factor receives the money, and dies indebted in debts of a higher nature, and it appears by evidence, that this money was vested in other goods, and remains unpaid, those goods shall be taken as part of the merchant's estate, and not the factor's. But if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of superior creditors, &c.; for as money has
no

no ear-mark, equity cannot follow that in behalf of him who employed the factor.

If *A.* employs *B.* as his factor to sell cloth, and *B.* sells the cloth on credit, and, before the money is paid, *B.* dies indebted by specialty more than his assets will pay; this money shall be paid to *A.* and not to the administrator of *B.* as part of his assets, but thereout must be deducted what was due to *B.* for commission; for a factor is in nature only of a trustee for his principal.

2 Vern. 638.
Burdett v.
Willett.

The plaintiff, being a factor in *Blackwell-Hall*, advanced money for his principal, relying, as was surmised, on the credit of cloths resting in his hands to reimburse himself: the clothier died, his administrator sued at law for the cloth, and the factor prayed that he might be allowed on account the monies he advanced: but his bill was dismissed; for if there are debts of a higher nature, it would be a *devastavit* in the administrator to pay or discount the plaintiff's debt.

2 Vern. 117.
Chapman
v. Derby.

[But it has been long settled, that a factor has a lien on goods consigned to him not only for incident charges, but as an *item* of mutual account for the general balance due to him. And though it be in general true, that by parting with the possession of the goods he parts with the lien, yet (*a*), if the factor sell the goods, he has still a lien on the price of them in the hands of the buyer; for though he has not the actual possession in such case, yet as he has the power of giving a discharge, or bringing an action for them, he must also have a right to retain the money for them.

Krutzer v.
Wilcox,
in Canc.
12th March
1754.
Gardiner v.
Coleman,
2d June
1755.
Godin v.
London
Assurance

Company, 1 Burr. 493.—(*a*) *Drinkwater v. Goodwin*, Cowp. 251.

But though the general rule of law be, that a factor has a lien on the goods of his principal for the general balance, yet this, like other general rules, may be controlled by the agreement of the parties: as, if *A.* deposit goods with *B.* for sale, and *B.* promise to pay the proceeds to *A.* when sold, *B.* has no lien on these goods (if not sold), for the balance of his general account arising from other articles, the express stipulation in this case negating the general rule of law.

Walker v.
Birch,
6 Term
Rep. 258.

A factor has no authority to pledge the goods of his principal as a security for his own debt, nor even to the amount of his lien for a general balance. Where he has done so (*b*), the principal has recovered the value of the goods in trover against the pledgee, on tendering to the factor what was due to him, without making any tender to the pledgee.

Paterfon
v. Tash,
2 Str. 1178.
(*b*) *Daubigny v. Duval*,
5 Term
Rep. 606.

per Buller and Grose, J., *basitante* Kenyon, C. J. who inclined to think, that the principal ought to tender to the pledgee the sum for which they are pledged, if under or to the amount of the money due from him to the factor, but not more.

Where a factor to one beyond the sea buys or sells goods for the person to whom he is factor, an action will lie against or for him in his own name; for the credit will be presumed to be given to him in the first case, and in the last, the promise will be presumed to be made to him; and the rather so, as it is so much for the benefit of trade. If a factor who receives cloths, and is authorized

Gonzales
v. Sladen,
Tr. 1 Ann.
Guildhall,
Salk. MSS.
Bull. N. P.
130.

Cowp. 255-
5.

thorised to sell them in his own name, makes the buyer debtor to himself; though he is not answerable for the debt, yet he has a right to receive the money. His receipt is a discharge to the buyer, and he has a right to bring an action against him to compel the payment; and it will be no defence for the buyer in that action to say, that, as between him and the principal, he (the buyer) ought to have that money, because the principal is indebted to him in more than that sum; for the principal himself can never say that, but where the factor has nothing due to him.

Bull. N. P.
130.

Cowp. 255.

(a) Scrimshire v.

Alderton,

2 Str. 1182.

A *del credere*

commission

is, where a

factor in consideration of an additional premium, acts as an insurer, and takes upon himself all risks. Thus,

the common factorage between St. Peterburgh and London is 2 per cent. ; but in consideration of an additional 3 per cent., the factor engages to stand as the middle man, and to run the hazard of bad debts. Com-

missions *del credere* are more common in this country, than perhaps in any other, the characters of the

buyers being better known, and the risk of course less.

However, a factor's sale by the general rule of law creates a contract between the owner and the buyer; and therefore if a factor sell for payment at a future day, if the owner give notice to the buyer to pay him and not the factor, the buyer will not be justified in afterwards paying the factor: and it is the same, notwithstanding the factor acts upon a *del credere* commission (a), as in the following cases.

Escof v.

Milward,

Sittings at

Guildhall,

after Mich.

Term, 1783.

Co. Bank-

rupt Laws,

456.

The plaintiffs were merchants in London, and in June 1783 had a quantity of wheat consigned to them from *Ostend*, the sale of which they intrusted to one *Farrer*, as their factor. The factors in the corn trade, like those in the linen trade, receive a *del credere* commission, besides their factorage, and never communicate the names of the purchasers to the owners, except in case of the factor's failure. *Farrer*, on the 9th June 1783, sold 211 quarters of the plaintiff's wheat to the defendant *Milward*. On the 16th June, *Farrer*, being about to stop payment, gave up the wheat under his care to the plaintiffs, and sent them the names of the buyers. On the 20th June, *Farrer* stoppt payment, and a short time afterwards his creditors executed a deed of composition. On the 21st June, the plaintiffs delivered the defendant a bill of parcels of the wheat sold to him by *Farrer*, as their factor, and desired him to accept a bill at a month for the amount, which he refused, insisting, that he had a right to set off a debt due to him from *Farrer*, against the price of the wheat.—Mr. Justice Buller, in his charge to the jury, declared the doctrine laid down by Lord Chief Justice Lee, in *Scrimshire v. Alderton*, to be law, and the plaintiffs recovered a verdict.

Ex parte

Murray,

Dec. 1783.

Co. Bank-

rupt Laws,

457.

Again, one *Murray* of Belfast, in 1782, consigned a quantity of linens to *Bate* and *Henkell* of London, to be disposed of by them as his factors, upon a *del credere* commission. *Bate* and *Henkell* sold the linens for 192*l.* 14*s.*, and before they received the money became bankrupts. The assignees afterwards received the money of the purchaser, which *Murray* demanded of the assignees, who refused to pay it, insisting, that *Murray* might come in as a creditor under the commission. *Murray* presented a petition to the Lord Chancellour, praying, that the assignees might be ordered to pay him the money his linen sold for, after deducting the commissions

missions and charges, and a small sum due from *Murray* to the bankrupts, on another account. His Lordship, after hearing the point of law argued, was clearly of opinion, that the purchaser, not being paid for the linens previous to the bankruptcy, *Murray* the consignor was entitled to receive the price of the linens, and accordingly ordered the assignees to pay him the money.

Upon this principle it has been determined, that goods of the principal found in the possession of the factor at the time of his becoming bankrupt, though he have a *del credere* commission, will not pass by the assignment.

Garrett v.
Cullum,
Bull. N. P.
5th ed. 42.
Godfrey v.
Fuizo, 3 P.
Ambl. 297.

Wms. 185. *Ex parte Dumas*, 2 Vez. 586. 1 Atk. 232. *Ex parte Ourfell*,

So, bills remitted by the principal to his factor, whilst unpaid, are in the nature of goods unsold, and if the factor become bankrupt, the principal may recover them in an action for money had and received, subject to such lien as the factor may have upon them.

Zinck v.
Walker,
2 Bl. Rep.
1154.

But a *del credere* commission will have the effect of enabling a policy-broker, under the clause in the 5 G. 2. c. 30. for setting mutual debts one against the other, to give in evidence upon the general issue, a loss upon a policy happening before the bankruptcy in an action by the assignees of the underwriter, for premiums upon policies underwritten by him.]

Grove v.
Dubois,
1 Term
Rep. 112.
Bize v.
Dickson,
id. 285.
That with-

out a *del credere* commission, he cannot set off the losses on goods which he insured for other persons, the debts being properly due to them, and not to the broker. *Willson v. Watson*, 1 Espin. 274.

(C) Of Partners and Joint-Traders.

[Partners are joint-tenants in all the stock and partnership effects; and they are so not only of the particular stock in being at the time of entering into the partnership, but they continue joint-tenants throughout, whatever changes may take place in the course of trade; for if it were otherwise, it would be impossible to carry on partnership trade. Hence assignees under a commission of bankrupt against one partner, can only be tenants in common of an undivided share, subject to all the rights of the other partner. And if a creditor of one partner takes out execution against the partnership effects, he can only have the undivided share of his debtor; and must take it in the same manner the debtor himself had it, and subject to the rights of the other partner. So that one partner can have no right against the other, in his capacity of partner, but to what is due from him out of the joint stock, after making all just allowances, let the fluctuations of trade be what they may. The whole of this doctrine seems to arise out of the very principle upon which partnership is founded, namely, probable profit, and the risk of loss; the advantages or disadvantages of which cannot, in common justice, be confined to one side only, but must be reciprocal throughout.

1 Vez. 242.

Cowp. 449.

12 Mod.
446.

Willett v.
Chambers,
Cowp. 814.

If two are *partners* as *attornies* and *conveyancers*, and one of them receives money to be laid out on mortgage, the *other* is *liable* for the amount, though his partner should even have given a *separate* receipt for it.

Grace v.
Smith,
2 Bl. Rep.
298.

On a motion for a new trial, the following facts were disclosed: An action was brought against *Smith* alone as a secret partner with one *Robinson*, to whom the goods were delivered, and who became bankrupt in 1770. On the 30th of *March* 1767, *Smith* and *Robinson* entered into partnership for seven years, but in *November* afterwards, some disputes arising, they agreed to dissolve the partnership. The articles were not cancelled; but the dissolution was open and notorious, and was notified to the publick on the 17th of *November* 1767. The terms of the dissolution were, that all the stock in trade and debts due to the partnership should be carried to the account of *Robinson* only. *Smith* was to have back 4200 *l.* which he brought into the trade, and 1000 *l.* for the profits then accrued, since the commencement of the partnership: He was to lend *Robinson* 4000 *l.* part of this 5200 *l.*, or let it remain in his hands for seven years, at five *per cent.* interest, and an annuity of 300 *l.* *per ann.* for the same seven years. For all this *Robinson* gave a bond to *Smith*. In *June* 1768, *Robinson* advanced to *Smith* 600 *l.* for two years' payment of the annuity and other sums by way of interest, and gratuities, and other large sums at different times to enable him to pay the partnership debts, *Smith* having agreed to receive all that was due to the partnership, and to pay its debts, but at the hazard of *Robinson*. On the 1st of *August* 1768, the demands of *Smith* were all liquidated and consolidated into one, *viz.* 5200 *l.* due to him on the dissolution of the partnership; 1500 *l.* for the remaining five years of the annuity, and 300 *l.* for *Smith's* share of a ship: in all 7000 *l.*; for which *Robinson* gave a bond to *Smith*. On the 22d of *August* 1769, an assignment was made of all *Robinson's* effects to secure the balance then due to *Smith*, which was stated to be 10,000 *l.* Soon after the commission was awarded.

De Grey, C. J.—The only question is, What constitutes a secret partnership? Every man who has a share of the profits of a trade, ought also to bear his share of the loss. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trade relies for his payment. If any one advances or lends money to a trader, it is not lent on his general personal security. It is no specifick lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for repayment: and there is no difference whether that money be lent *de novo*, or left behind in trade by one of the partners who retires: and, whether the terms of that loan be kind or harsh, makes also no manner of difference. I think the true criterion is, to inquire whether *Smith* agreed to share the profits of the trade with *Robinson*, or whether he only relied on those profits, as a fund of payment: a distinction not more nice, than usually occurs in questions of trade or usury. The jury have said this is not payable out of the profits; and I think there is no foundation

foundation for granting a new trial.—*Blackstone*, J. concurring in opinion with the Chief Justice, said, I think the true criterion (when money is advanced to a trader) is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case it is a *loan* (whether usurious or not, is not material to the question), in the latter a *partnership*. The hazard of loss and profit is not equal and reciprocal, if the lender can receive only a limited sum for the profits of his loan, and yet is made liable to all the losses, all the debts contracted in trade, to any amount.

Where the defendant had been partner with one *Brooke*, and they agreed to separate, and *Brooke* agreed to give him his bond for 2485 *l.* with interest, which sum had been brought by the defendant into trade, and an annuity of 200 *l.* for seven years, if *Brooke* so long lived, as in lieu of the profits of the trade; and the defendant had at all times liberty to inspect *Brooke's* books; he was adjudged to be a partner and liable; for the charge had reference to the profits; it was *casual* as depending on *Brooke's* life, and his right to inspect the books was that of a partner.

Bloxam v. Pell, 2 Bl. Rep. 998.

But, in order to constitute a partnership, and to make a person liable as a partner, there must be an agreement between him and the ostensible person to *share in all risks of profit or loss*, or he must have permitted the other to use his credit, and to hold him out as jointly liable with himself. A man entering into an agreement, and afterwards subdividing his beneficial interest under it, among others, is alone liable to the performance, and the subcontract does not constitute a partnership. Thus, an action was brought by the plaintiffs, who were the owners of a *Greenland* ship, against the defendants, upon an agreement to purchase a cargo of oil. The declaration stated, that on the 29th of *August* 1786, the plaintiffs sold the cargo to the defendants, at the rate of 20 *l.* per ton, to be received as soon as it was boiled and ready. That by way of collateral security, two bills of exchange were deposited in the hands of the plaintiffs, one of which was accepted by the defendants *Eyre*, *Atkinson*, and *Walton*. That the sale being so made, and it being expected that the defendants would not take away the oil pursuant to the terms of the sale, it was afterwards agreed between the plaintiffs and defendants, by the name of *Benjamin Eyre* and Co., that the plaintiffs should keep the oil in their possession, till the 1st of *January* following; and if the defendants did not pay for it on or before that day, the plaintiffs were to be at liberty to authorise the broker to resell it at the best price he could get; and if upon such resale, the oil should not produce 20 *l.* per ton, with all charges, the plaintiffs were to deduct the difference of the price out of the bills placed in their hands as a collateral security. The declaration then stated, that the defendants neither paid for the oil, nor took it away, and therefore the plaintiffs authorised the broker to resell it. That the deficiencies upon the resale amounted to 400 *l.* besides brokerage, &c. 100 *l.*, and that the bill of exchange accepted by the defend-

Hoare v. Dawes, Dougl. 371.

Coope v. Eyre, 1 H. Bl. 37.

ants was presented to them for payment, and refused. Before this action was brought, *Eyre and Co.* had become bankrupts. It appeared in evidence on the trial, that on the 24th of *August* 1786, the defendants, *Eyre* for himself and partners, who were *Atkinson* and *Walton*, general merchants, *Hatterfley* for himself and *Stephens*, who were oil merchants, and *Pugh* for himself and son, who were also oil merchants, agreed to purchase jointly as much oil as they could procure, on a prospect that the price of that commodity would rise; that *Eyre* should be the ostensible buyer, and the others share in his purchase, at the same price which he might give. *Hatterfley* and *Co.* were to have one-fourth, *Pugh* one-fourth, and *Eyre* and *Co.* the remaining moiety. That they bought large quantities of oil, belonging to other ships, and other traders, besides the plaintiffs, in the name of *Eyre* and *Co.* That *Hatterfley* and *Pugh* occasionally came forwards, and gave directions as to the delivery of the oils, and otherwise interfered in the transaction; and also made many declarations, that they were all jointly interested in the different purchases, and that there was a general concern between them. On the part of the defendants it was insisted, that the contract of sale was made between the plaintiffs and *Eyre* and *Co.* only; and that the agreement entered into between themselves was only a subcontract, and did not constitute a partnership; and the learned Judge who tried the cause being of the same opinion, directed a verdict to be found for the defendants, which was accordingly done. The plaintiffs therefore moved the court for a new trial, on the ground of misdirection; and after the case had been fully argued, the court refused to grant a new trial, being of opinion that the verdict was proper. For as this was an action on a contract of sale, the vendor can have no remedy against any person with whom he has not contracted, unless there be a partnership; in which case all the partners are liable as one individual. It was justly observed, that a secret partnership can be no consideration to the vendor, though, for reasons of policy and general expedience, the law is positive with respect to the secret partner, that when discovered he shall be liable to the whole extent. In many parts of *Europe* limited partnerships are allowed, provided they be entered on a register; but the law of *England* is otherwise, the rule being, that if a partner shares in advantages, he also shares in all disadvantages. In order to constitute a partnership, a communion of profit and loss is essential: and the shares must be joint, though it is not necessary that they should be equal. If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale; otherwise they are not partners. In the present case *Eyre* was a mere speculator, and the other defendants were to share in the purchase, but were not jointly interested in any subsequent disposition of the property. Though they may by other purchases have concluded themselves as to some particular vendors, yet in the transaction in question there was not that communion between them, which is necessary to make them partners;

ners; their agreement was a subcontract, which may be executory; as it was to share in a purchase to be made. The seller looked to no other security than *Eyre and Co.* To them the credit was given, and they only were liable.]

If two or more engage in a joint undertaking in the way of trade, or enter into copartnership, it is not necessary to provide against survivorship; for, by a maxim of the common law, *jus accrescendi inter mercatores locum non habet*; and this is for the benefit of trade and commerce, that the fruits of each person's labour and industry should descend to his children and family.

But if two joint merchants make *B.* their factor, and one dies, leaving an executor, this executor and the survivor cannot join in an action (*a*) against the factor; for though the duty does not survive, yet the remedy does; and therefore, on recovery, the survivor must be accountable to the executor for that.

and the surviving merchant be jointly sued, because the first is to be charged *de bonis testatoris*, and the other *de bonis propriis*. Carth. 170, 171. 3 Lev. 290. 2 Lev. 223. Fortesc. Rep. 181.

The plaintiff's husband (to whom she is administratrix) and the defendant were copartners for many years in the trade of a druggist; the plaintiff brought her bill for a discovery of the estate, and her proportion and dividend thereof, &c. the defendant answered; and it appearing that many debts owing to the joint trade stood out, it was moved on behalf of the plaintiff, that an able attorney might be appointed to sue for and recover those debts; it being alleged in the bill, that the defendant carrying on a distinct trade for himself, with the persons that were debtors to the joint trade, to oblige them, he forbore to call in their debts; and it was ordered accordingly, unless the defendant, within a week, would give security to the plaintiff, to answer her moiety of the debts that were standing out.

By the custom of *England*, where there are two joint traders, and one accepts a bill, drawn on both for him and partner, it binds both if it concerns the trade; otherwise, if it concerns the acceptor only in a distinct interest and respect.

A. and *B.* were partners as woollen-draper, *A.* received money in the shop of *S. S.* and gave a note for it signed by himself and partner; *A.* and *B.* being both dead, and *A.* not leaving sufficient assets, it was held, on a bill brought by *S. S.* against the executors of both the partners, that this note being given by one of the partners, it should bind them both; and that though at law it binds only the executor of the surviving partner, yet in equity the creditor may follow the estate of the other, though no (*b*) proof was made that this money was brought into the stock, or used in trade.

can shew a disclaimer, and a refusal to be concerned. Salk. 292. pl. 33.

[Two entered into articles of copartnership, and each brought in 1000*l.* stock. There was to be no benefit of survivorship, neither was to become indebted without the other, nor either to take out of the stock without the other. One became indebted without the consent of his partner, and made his wife executrix, and died.

Vern. 217.
Et vide
tit. Joint-
tenants and
Tenants in
Common.

2 Salk. 444.
pl. 3. Ld.
Raym. 340.
Martin v.
Crump.
(a) Nor can
an executor

Vern. 118.
Eftwick v.
Conninby.

Salk. 126.
pl. 3.
Pinkney
v. Hal.
Ld. Raym. 175.

2 Vern. 277.
Lane v.
Williams.
(b) That the
act of one
partner shall
be presumed
the act of
the other,
and shall
bind him,
unless he
292. pl. 33.

2 Ch. Ca.
33.

died. The wife *confessed judgment* for the debt. The other sues for an account and relief against the creditor and the wife. They confess the *articles*, and the obtaining judgment. Lord Chancellor granted an injunction against the judgment, because the debt related not to the partnership, saying, if this be suffered, no trade could be in such case.

Minnitt v.
Whitney,
Vin. Abr.
tit. Part-
ners (A),
pl. 12.

So, where three persons entered into partnership in the trade of sugar-boiling, and agreed that no sugars should be bought without the consent of the majority; one of them afterwards makes a protest that he would no longer be concerned in partnership with them: the two other persons after make a contract for sugars: the feller having notice that the third had disclaimed the partnership, he shall not be charged.]

Salk. 392.
pl. 1.
Heydon v.
Heydon; &
vide Show.
173-4.
Comb. 217.

A. and *B.* are copartners, and a judgment is had against *A.*, and the goods of both are taken in execution: it was held *per cur.* that the sheriff must seize all, because the moieties are undivided; for if he seize but a moiety and sell that, the other will have a right to a moiety of that moiety; therefore he must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner.

Eddie v.
Davidson,
Doug. 650.

[The *defendant* was partner with one *Bernie*, against whom a commission of bankrupt had issued, but, before the bankruptcy, the *plaintiff* had sued out execution on a bond of the *defendant's* for 700*l.*, and the sheriff had levied on the partnership effects. *Bernie's* assignees obtained this rule, to shew cause why the sheriff should not pay them a moiety of the money arising from the sale of the goods so taken in execution, upon an affidavit of *Bernie's*, that he was entitled to an equal share of the partnership effects, as partner with *Davidson*. The *plaintiff's affidavit*, on shewing cause, denied that *Bernie* had an equal share in the partnership effects, and stated that he had embezzled the joint stock to a considerable amount. The court directed that it should be referred to the master to take an account of the share of the partnership effects to which *Bernie* was entitled; and that the sheriff should pay a part of the money levied, equal to the amount of such share, to the assignees.

Jacky v.
Butler,
2 Ld. Raym.
371.

Judgment was entered against one of two partners, and upon a *feri facias*, all the goods, being undivided, were seized in execution. Upon application to the King's Bench by him against whom the judgment was not, the court held, that the sheriff could not sell more than a moiety, for the property of the other moiety was not affected by the judgment, nor by the execution.

Richardson
v. Goodwin,
2 Vern. 293.

Richardsons senior and junior, and one *Janfon* were partners together in trade, and *Janfon* embezzled and wasted the joint stock, and contracting private debts became a bankrupt. The court seemed to think, that out of the produce of the goods, the debts owing to the joint trade ought to be paid in the first place; and that, out of *Janfon's* share, satisfaction must be made for what *Janfon* had wasted or embezzled; and that the assignees could be

in no better case than the bankrupt himself, and were entitled only to what his third part would amount unto, clear after debts paid, and deductions for his embezzlement.

A bill was brought, setting forth that *Goss*, *Neaulme*, *Gromvegan*, and *Prevost* became partners: that *Prevost* was intrusted with the goods in the shop and warehouse, but became profuse, and embezzled the partnership stock, and applied the same to his own use, and suffered the partnership debts to be unpaid; and having contracted private debts on his own account, became a bankrupt, and a separate commission was taken out against him.

A question was raised, whether *Prevost's* share of the partnership stock ought to be applied, in the first place, to pay what he was indebted to the partnership?

Lord *Talbot* ordered an account of what *Prevost* had embezzled of the partnership estate, and that the partnership debts should in the first place be paid to the joint creditors in proportion to their debts, and as far as the partnership estate would extend; and that if any of the partnership estate remained, after the joint debts were paid, then the same to be divided, and the partnership to be paid out of *Prevost's* share what he had embezzled.]

Although a moiety of a joint stock may be taken in execution on a judgment against one partner; yet, if copartners become bankrupts, the joint estate is to discharge the joint debts in the first place, and the separate estate to pay the separate debts; and if there be no separate estate, then the residue of the joint estate, after the joint creditors are satisfied, to be applied among the separate creditors, and so *vice versa*; for the commissioners of bankrupts are intrusted both with a legal and equitable jurisdiction, and may therefore marshal (a) the different effects, and apply them in discharge of the different creditors according to equity and justice.

[*A.* and *B.*, goldsmiths and partners, were bound to *J. S.* in a bond for payment of 1000 *l.* and interest in 1693. Afterwards in the same year they dissolved the partnership, when *A.* by money and bond secured to *B.* his share of the stock, and took upon himself the partnership debts. Publick notice was given to creditors of the joint stock to receive their money, or to look upon *A.* only as their paymaster. *J. S.* in 1708 called in his money from *A.*, but continued it on *A.'s* subscribing the bond at 6 per cent. *A.* was solvent till 1711, and till then *J. S.* might have had his money when he pleased; but then *A.* became a bankrupt. Lord Chancellor *Parker* held, that the executor of *B.* was still liable; that the notice was *res inter alios acta*, and could not bind *J. S.*; and that changing the interest did not alter the security; for still it was the bond of both; but *B.'s* executor could not be liable to more than 5 *l.* per cent. interest; and *J. S.* was decreed his debt and costs.

Gibson and *Sutton* were partners in the business of a scrivener and banker. The mother of the plaintiff *Mrs. Jacomb*, and the mother of the plaintiff *Mrs. Long*, both kept cash in this shop; and each of them, out of the cash belonging to her, ordered a sum

Goss v. Dufresney,
Dav. Bank-
rupt Laws,
371.

2 Chan.
Rep. 228.
2 Vern. 293.
706. Pasch.
4 Geo. 2.
Grace v.
Hyam.
Barnard.
K. B. 469.
[(a) But not
without an
order.
1 Atk. 68.
pl. 23.]

Heath v.
Percival,
1 P. Wms.
682.

Jacomb v.
Harwood,
2 Vez. 263.

to be written off from her account, and that a note or security for each of these sums should be given to each of the plaintiffs; which was done, and signed by the cashier belonging to the partnership. *Gibson* survived this about a year, and made *Sutton* and another executors. The cashier, by his answer, (there being no other evidence,) believed, from entries in the books, that interest for this was paid to the death of *Gibson*, and mentioned payments of interest also for three years at 4 per cent. by *Sutton* after *Gibson's* death, when in point of law the partnership effects survived to *Sutton*; but after that the two plaintiffs separately called upon *Sutton* for a further security than those bare notes; and therefore judgment was entered up in an action against him, not as executor of *Gibson*, but as surviving partner for a partnership debt. That judgment was defeasanced by an instrument signed by the plaintiffs as to their respective demands, agreeing, that no execution should be taken on either of these judgments till such a time. In that agreement it was particularly inserted, that these judgments thus obtained by the two plaintiffs should not hinder either of them from any remedy they might be entitled to in a court of equity against *Gibson's* estate or effects, if they were not otherwise paid or discharged. Immediately before the respite of the execution expired, *Sutton* being called on, or knowing that the time was near, mortgaged part of a leasehold estate, which was confessedly part of the separate estate of *Gibson* his deceased partner. The plaintiffs filed their bill, as copartnership creditors, to subject the chattel interest in that mortgage to a satisfaction of both their demands, by a sale thereof. It did not appear, otherwise than from the two notes, in what manner the money, that had been ordered by the mothers of the plaintiffs, to be carried from their two accounts, was left in the hands of the partners, whether, as cash kept generally, or only those two sums. The Master of the Rolls strongly inclined to think, that the debt, notwithstanding the judgment, still continued a partnership debt, being obtained against defendant as surviving partner. But if not so, if it were his own debt, it was certain, that the defendant, possessed as executor of the personal estate of *Gibson*, might apply any part thereof even to the satisfaction of his own demand, unless there was fraud or collusion, of which there was no evidence in the present case. The plaintiffs were most undoubtedly creditors unsatisfied; and therefore it was not an application of the separate estate of *Gibson* to demands, which ought not to be countenanced in equity, but to that which the executor had a right to apply it, and which perhaps that estate of his without this act of *Sutton* must have been subject to have made satisfaction; for the partnership creditors would have a right to go against the separate estate of either of the partners after the partnership effects. But that this was nothing to the justice of the plaintiffs' demands, who had used diligence to get at their money in a lawful and honest way; that they were not to be blamed, supposing their demands were against *Sutton* on the judgment, in getting the best security they could for their money, which was this mortgage. His Honour therefore held them entitled to the relief they prayed.]

(D) Of Partners and Masters of Ships.

IF there are several part-owners of a ship, and some of them refuse to navigate the ship, or to send her to sea; those, who are willing, may compel the others in a court of Admiralty, on giving security to answer for the ship in case she be lost. Also, if a partner dislikes the voyage, but does not expressly prohibit it, and the ship is lost in the voyage, he shall have no recompence for his part; but if the ship return, he shall have an account for what is earned, and it shall be intended a voyage with his consent, without an express prohibition proved.

Molloy,
202, 203.
Skin. 230.
pl. 9.
2 Chan.
Ca. 36.

But if the major part of the owners refuse to navigate the ship, there, says *Molloy*, by reason of the inequality, they cannot be compelled; but then such vessel is to be valued and sold in like manner, as where part of the owners become deficient, or unable to set out the ship.

Molloy,
203.

If there are several part-owners of a ship, and the major part of them are for sending her a voyage to sea, to which the rest disagree; whereupon, according to the common usage in such cases, the greater number suggest in the Admiralty court the disagreement of their partners; and then, according to their usage there, they order certain persons to appraise the ship, who accordingly set a value thereon; and then the major part, who agreed to the voyage, enter into a recognizance, wherein they bind themselves jointly and severally, to the disagreeing parties, in a sum proportionable to their shares, according to the value set by the appraisers, to secure the shares in the ship of those who disagree to the voyage, against all adventures; though there can be no suit on this agreement or stipulation in the Admiralty court (a), the contract being made on land, and therefore of common law consequence; yet a special action on the case lies for the violation thereof at common law.

Carth. 26.
Knight v.
Berry.
Hard. 473.
S. P.
6 Mod. 162.
S. P.
[(a) That
the Admir-
alty have
jurisdiction
upon such
a stipulation,
see *Grave*
v. *Hedges*,
Holt, 470.
Lambert v.
Acree,
1 *Ld. Raym.*
223.
Blacket v.
Ansley,
1 *Willf.* 101.]

Id. 235. *Dimock* v. *Chandler*, 2 Str. 890. *Fitzg.* 197. S. C. *Ouston* v. *Hebden*, 1

A master of a ship is one who, for his knowledge in navigation, fidelity, and discretion, hath the government of the ship committed to his care and management; but he hath no (b) property either general or special by the constituting of him a master; yet the law looks upon him as an officer, who must render and give an account for the whole charge, when once committed to his care and custody, and upon failure to render satisfaction; and therefore if misfortunes happen, if they be either through negligence, wilfulness, or ignorance of himself or his mariners, he must be responsible.

Molloy,
208. *Hob.*
11. (b) But
hath usually
shares or
parts in the
vessel. *Mol-*
loy, 203.—
He is eli-
gible by the
part-owners
in propor-
tion to their
shares, and not
according to the
majority. *Molloy*, 203.

But where a master of a ship brought an action on the case, and declared, that the ship was laden with corn in such a harbour, ready to sail for *Dantzick*, and that the defendant entered and seized the ship, and detained her, *per quod impeditus & obstructus fuit in viago*; it was held, that it well lay; for though the

Salk. 10.
pl. 4. *Pitta*
v. *Gaunce*.
Ld. Raym.
558.

master has not the property of the ship, but the owners, and he is only a particular officer, and can only recover for his particular loss; yet he may bring trespass, as a bailiff of goods may; and then as bailiff he can only declare on his possession, which is sufficient to maintain trespass.

Vent. 190.
238.
Raym. 220.
3 Keb. 72.
112. 135.
Mod. 85.
2 Lev. 69.
More
and Sluce.
3 Lev. 259.
S. C. cited.
2 Ld. Raym.
918.

If the master of the ship takes goods on board for hire, and is robbed in port, he must answer the damage; otherwise it is, if he be robbed by pirates on the high sea, for then the owner must be the loser; for if he undertakes for hire to carry the goods, the common law cannot look upon him in a different aspect from a common carrier; for he cannot be looked upon as a mere servant to the owner, but rather as an officer of the ship, and to sell the *bona peritura*, which is beyond the condition of a servant: but the civil law of the Admiralty excuses the masters when robbed by pirates, or on losing the goods by any inevitable accident, for the dangers of the sea are so various and so formidable, that a master shall not be understood to undertake against them, unless it had been included in the express words of the contract; for where, in a well-ordered society, a man undertakes for the custody of another's property, he secures him against all loss; but where a man is bound to encounter dangers, which civil society cannot guard against, he cannot be supposed to undertake farther than for his care; and by the general custom of commerce, the merchant is the person that runs the venture, and not the master of the ship; and it is the merchant that makes the gain of the venture.

Carth. 58.
2 Salk. 440.
Pl. 1.
3 Lev. 258.
3 Mod. 322.
Boson v. Sandford.

And as the master himself is answerable in the cases *supra*; so likewise hath it been held, that the owners are liable to the freighters, in respect of the freight, for the embezzlement, &c. of the master and mariners.

[This act was made in consequence of the case of Boucher v. Lawson, H. 5 Geo. 2. where the goods were lost by the negligence or embezzlement of the master, and the master was entitled to the freight of those goods for his own benefit, and the action was brought against the owners. The court thought,

But this proving a great discouragement to trade, by the 7 G. 2. c. 15. reciting that, *Whereas it is of the greatest consequence and importance to this kingdom, to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein; and whereas it has been held, that in many cases owners of ships or vessels are answerable for goods and merchandize shipped, or put on board the same, although the said goods and merchandize, after the same have been so put on board, should be made away with by the masters or mariners of the said ships or vessels, without the knowledge or privity of the owner or owners; by means whereof, merchants and others are greatly discouraged from adventuring their fortunes, as owners of ships or vessels, which will necessarily tend to the prejudice of the trade and navigation of this kingdom; therefore for ascertaining and settling how far owners of ships and vessels shall be answerable for any gold, silver, diamonds, jewels, precious stones, or other goods or merchandize which shall be made away with by the master or mariners, without the privity of the owners thereof; it is enacted, " That no person or persons, who is, are, or shall be owner or owners of any ship or vessel, shall be subject or liable to answer for, or make good to any one or more person or persons,*

persons, any loss or damage by reason of any embezzlement, secreting, or making away with (by the master or mariners, or any of them) of any gold, silver, diamonds, jewels, precious stones, or other goods or merchandize, which, from and after the 24th of June 1734, shall be shipped, taken in, or put on board any ship or vessel, or for any act, matter, or thing, damage or forfeiture done, occasioned, or incurred from and after the said 24th day of June 1734, by the said master or mariners, or any of them, without the privity and knowledge of such owner or owners, further than the value of the ship or vessel, with all her appurtenances, and the full amount of the freight, due or to grow due, for and during the voyage wherein such embezzlement, secreting, or making away with, as aforesaid, or other malversation of the master or mariners, shall be made, committed, or done; any law," &c.

that it was not to be distinguished from the common case of the carrier, and that the owner was liable for the act of the master where he acted within the compass of his employment.
1 Term Rep. 78.]

And, by § 2. it is further enacted, " That if several freighters or proprietors of any such gold, silver, diamonds, jewels, precious stones, or other goods or merchandize, shall suffer any loss or damage by any of the means aforesaid, in the same voyage, and the value of the ship or vessel, with all her appurtenances, and the amount of the freight, due or to grow due, during such voyage, shall not be sufficient to make full compensation to all and every of them, then such freighters or proprietors shall receive their satisfaction thereout in average, in proportion to their respective losses or damages; and in every such case it shall and may be lawful to and for such freighters or proprietors, or any of them, in behalf of himself, and all other such freighters or proprietors, or to or for the owners of such ship or vessel, or any of them, on behalf of himself, and all the other part-owners of such ship or vessel, to exhibit a bill in any court of equity for a discovery of the total amount of such losses or damages, and also of the value of such ship or vessel, appurtenances and freight, and for an equal distribution and payment thereof amongst such freighters or proprietors, in proportion to their respective losses or damages, according to the rules of equity.

" Provided (by § 3.), that if any such bill shall be exhibited by or on the behalf of the part-owners of such ship, the plaintiff or plaintiffs shall annex an *affidavit* to such bill or bills, that he or they do not collude with any of the defendants thereto; and shall thereby offer to pay the value of such ship or vessel, appurtenances and freight, as such court shall direct; and such court shall thereupon take such method for ascertaining such value, as to them shall seem just; and shall direct the payment thereof in like manner, as is now used and practised in cases of bills of interpleader.

" Provided also (by § 3.), that nothing in this present act contained shall extend, or be construed to extend to impeach, lessen, or discharge any remedy, which any person or persons now hath, or shall or may hereafter have, against all, every, or any the master or mariners of such ship or vessel, for or in respect

“ of any embezzlement, secreting, or making away with any gold,
 “ silver, diamonds, jewels, precious stones, or merchandize, ship-
 “ ped or loaded on board such ship or vessel, or on account of
 “ any fraud, abuse, or malversation of and in such masters and
 “ mariners respectively; but that it shall and may be lawful to
 “ and for every person or persons, so injured or damaged, to pur-
 “ sue and take such remedy for the same, against the said master
 “ and mariners respectively, as he or they might have done before
 “ the making of this act.”

Sutton v.
 Mitchell,
 1 Term
 Rep. 18.

[Upon this statute it hath been adjudged, that the owner of a ship is liable to the value of the ship and freight in the case of a robbery, in which one of the mariners is concerned, by giving intelligence, and afterwards sharing the spoil, the latter part of the first section being sufficiently comprehensive to include a transaction of this nature.

However, by stat. 26 G. 3. c. 86. which is explanatory and in amendment of the above act of 7 G. 2. the owners are not liable beyond the value of the ship and freight for any goods shipped without their privity, although the master or mariners be in no-wise concerned in or privy to the robbery, embezzlement, secreting, or making away therewith.

By § 2. no owners of any ship or vessel shall be liable to answer for any loss or damage which may happen by fire to any goods or merchandizes that may be shipped on board. Nor by § 3. for any loss or damage to any gold, silver, diamonds, watches, jewels, or precious stones, that may be shipped on board, by reason of any robbery, embezzlement making away with, or secreting thereof, unless the owner or shipper thereof shall, at the time of shipping the same, insert in his bill of lading, or otherwise declare in writing to the master, or owners of the ship or vessel, the true nature, quality, and value of such gold, &c.

By § 4. if the freighters or proprietors of any such gold, &c. or other merchandize, shall suffer any loss or damage by any of the means aforesaid, in the same voyage, (fire only excepted,) and the value of the ship or vessel, with all her appurtenances, and the amount of the freight due or to grow due during such voyage, shall not be sufficient to make compensation to all of them, then such freighters or proprietors shall receive their satisfaction thereout in average, in proportion to their respective losses or damages. And in such case the freighters or proprietors, or any of them, or on behalf of himself and all other the freighters or proprietors, or the owners of such ship or vessel, or any of them, or on behalf of himself and all other the part-owners, may exhibit a bill in any court of equity, for a discovery of the total amount of such losses or damages, and also of the value of such ship or vessel, appurtenances, and freight, and for an equal distribution and payment thereof amongst such freighters or proprietors, in proportion to their respective losses or damages, according to the rules of equity; provided, that if any such bill be exhibited on behalf of the part-owners of such ship, the plaintiff shall annex an affidavit to such bill, that he does not collude with any of the defendants

defendants thereto; and shall thereby offer to pay the value of the ship, appurtenances, and freight, as the court shall direct; and the court shall thereupon take such method for ascertaining the value as to them shall seem just, and shall direct the payment thereof, in like manner as is used and practised in cases of bills of interpleader.

By § 5. it is provided, that this act shall not lessen or discharge any remedy which any person now hath, or shall hereafter have, against any master or mariners for embezzlement, &c.

The defendant was sole owner of a ship which he let to J. S. for a voyage at a certain sum, and J. S. was to have the benefit of carrying the goods. The plaintiff had shipped a quantity of moidors, and the bills of lading were signed by the captain: the moidors being lost, an action was brought against the defendant as owner, to charge him under the stat. 7 G. 2. to the amount of the ship and freight. For the defendant it was insisted, that though the ship was his property, yet he was not *so* owner as to be liable to the plaintiff; and that J. S. was for this purpose the owner. But it appearing that the defendant had covenanted for the condition of the ship, and the behaviour of the master; the Chief Justice held, he was liable to the plaintiff, and the freight he had in general from J. S. was sufficient, though the identical freight for the gold belonged to the other, and J. S. had only the use of the ship, and no ownership.

Parish v. Crawford
2 Str. 1251.

The master of a vessel was lessee of her for a term of years by agreement with the owners, in which there were covenants on *their* part, that he should have the sole management of the ship, and employ her for his own sole benefit; and on *his* part, that he should repair her at his own sole cost and charge, &c. It was holden, that notwithstanding this agreement, the owners were liable for necessaries furnished for the ship by order of the master, though without their knowledge, and though the owners were not known to the persons who supplied them.

Rich v. Coc,
Cowp. 636.

In general, whoever supplies a ship with necessaries, has a *treble* (a) security. 1. The person of the master. 2. The specific ship. 3. The personal security of the owners, whether they know of the supply or not. 1. The master is personally liable, as making the contract. 2. The owners are liable in consequence of the master's act, because they choose him: they run the risk, and they say, whom they will trust with the appointment and office of master. Such is stated to be the general law, which however is liable to be varied by any private agreement between the master and owners. For if it appear, that the person supplying the necessaries gave credit to the master individually as the responsible person, or on the other hand, that he considered the master merely as a servant, and gave the credit to the owners only, in either of those cases, he can have his remedy against that party only to whom he originally looked for payment (b).

Ibid.
(a) But according to Mr. J. Buller, the creditor, when he advances his money, has only two securities, viz. the body of the ship, and the person of the master. It is only in respect of the ship,

that the master can bind the owners. If the owner keeps the ship, he keeps her subject to the charge the master has brought upon her. If he relinquish the ship, he is not liable to the charge.—His keeping the ship is proof of his assent. Upon this ground, that learned judge dissented from the rest of the court, who held, that a promise by a captain on behalf of the owners, when the ship was taken, to

pay monthly wages to one of the sailors, in order to induce him to become a hostage, was binding upon the owners, although they abandoned the ship and cargo. *Yates v. Hall*, 1 Term Rep. 73. (b) *Hoskins v. Slayton*, Ca. temp. Hardw. 376.

Speering v. Degrave,
2 Vern. 643.

J. S. as master of the ship, of which the other defendants were part-owners, bought several goods of the plaintiffs; as, beef, biscuit, sails, and cordage. *J. S.* the master failed. The bill was brought to compel the defendants, the part-owners, to pay. They insisted, that *J. S.* only was liable; and, besides, that he had money from them to pay the plaintiffs. *Per curiam*.—*J. S.* the master was but a servant to the owners; and where a servant buys, the master is liable. If the owners paid their servant, yet, if he paid not the creditors, they must stand liable. It was decreed, that the owners should pay the plaintiffs their debts in proportion to their respective shares and interests in the ship.

Lex Mercat. 53.
Hob. 11.
Moor, 918.

But, if the master borrow money to repair or victual the ship, when there is no occasion for it, he alone is debtor, and not the owners.

By the law of nations the captain has a power to ransom. This is for the benefit of the owners: but it being doubted, whether it is for the benefit of the publick, it is taken away by statute of 22 G. 3. c. 25.]

(E) Of Mariners.

Molloy,
209.

Mariners are persons chosen and appointed by the master to navigate the ship, for whose faults and miscarriages he must answer; and, as they are his servants, he may correct and punish them according as the usage is at sea.

Roll. Abr.
530. &
vide Roll.
Rep. 285.

But though the master must answer for them, yet are the owners likewise answerable for their faults and miscarriages; as, if the owner of a ship victuals it, and furnishes it to sea with letters of reprisal, and the master and mariners, when they are at sea, commit piracy upon a friend of the king, without the notice or consent of the owner, the owner shall lose his ship by the admiral law, of which our law ought to take notice.

1 Sid. 179.
1 Mod. 93.
1 Ventr. 146.
[*Moll. Bk.*
2. c. 3.
Com. Dig.
tir. Naviga-
tion, I. 5.]
(c) But
whether the
executors

By the civil law and custom of merchants, if the ship be cast away, or perish through the mariners' default (c), they lose their wages. So, if taken by pirates (d), or if they run away; for, if it were not for this policy, they would forsake the ship in a storm, and yield her up to enemies in any danger. [So, if they refuse aid and assistance to their companions on the sea. So, if they do not help to save the goods, when the ship perishes. So, if they absent themselves, when the ship is ready to fail.]

of those mariners, who died before the ship was cast away, may recover the wages due to their testators, *quære*, & *vide* Sid. 179. *Keb.* 684. (d) So, by 8 Geo. 1. c. 24.

And by the 22 & 23 Car. 2. c. 11. § 7. it is enacted, " That if the mariners or inferior officers of an *English* ship, laden with goods and merchandize, shall decline or refuse to fight and defend the ship, when they shall be thereunto commanded

“ by the master or commander thereof, or shall utter any words
 “ to discourage the other mariners from defending the ship, every
 “ mariner, who shall be found guilty of declining or refusing as
 “ afore said, shall lose all his wages due to him, together with such
 “ goods as he hath in his ship, and suffer imprisonment, not ex-
 “ ceeding the space of six months; and shall, during such time,
 “ be kept to hard labour for his or their maintenance.”

And, by § 9. of the said statute, “ every mariner, who shall
 “ have laid violent hands on his commander, whereby to hinder
 “ him from fighting in defence of his ship and goods committed
 “ to his trust, shall suffer death as a felon.”

[By the custom of merchants, mariners are entitled to wages at
 every delivering port; and it hath been holden that they are so,
 though an agreement was made with them, that they should not
 demand wages till the return of the ship to the port of *London*;
 when the freight was to be paid; and a provision was made before
 the voyage, that, every six months, wages should be paid for one
 month, during the voyage.

Edwards
 v. Child,
 2 Vern. 727.

It was said by *Holt*, C. J. that if the ship be lost before the first
 port of delivery, the seamen lose all their wages: but, if after she
 has been at the first port of delivery, then they lose only those
 from the last port of delivery. But if they run away, although
 they have been at a port of delivery, yet they lose all their wages.
 It was also ruled by the same judge at *nisi prius*, that if a ship be
 bound for the *East Indies*, and thence to return to *England*, and
 the ship unlade at a port in the *East Indies*, and take freight to
 return to *England*, and in her return she be captured; the ma-
 riners shall have their wages for the voyage to the *East Indies*, and
 for half the time that they staid there to unlade, and no more. In
 an action brought for mariners' wages for a voyage from *Carolina*
 to *London*, it appeared, that the plaintiff served three or four
 months, and before the ship came to *London*, which was the de-
 livering port, he was impressed into the queen's service; and after-
 wards the ship arrived at the delivering port. It was ruled by
Holt, C. J. that the plaintiff should recover *pro tanto* as he served,
 the ship coming safe to the delivering port. But when afterwards,
 in such an action between *Chandler* and *Meade*, it appeared, that
 the plaintiff was hired by the defendant at *Carolina* to serve on
 board the *Jane* sloop, whereof the defendant was master, from
Carolina to *England*, at 3 *l.* per month; that he served two months;
 that then the ship was taken by a *French* privateer and ransomed;
 that just as she came off *Plymouth*, the plaintiff was impressed;
 and then the ship came safe into the *Thames*, where she disposed
 of her cargo; it was ruled by *Holt*, that the plaintiff could have
 no wages, the ship having been captured and ransomed. It was
 insisted by the plaintiff's counsel, that in that case he should re-
 cover *pro rata*, and that the usage among merchants was so; which
Holt said, if he could prove, it would do; but wanting proof of it,
 he was nonsuited.

1 Ld. Raym.
 639.

Id. 739.

Wiggins v.
 Ingleton,
 2 Ld. Raym.
 1211.

If a sailor hired for a voyage take a promissory note from his
 employer for a certain sum, provided he proceed, continue, and
 do

Cutter v.
 Powell,
 6 Term
 Rep. 320.

do his duty on board for the voyage, this contract is indivisible, and if he die before the arrival of the ship, no wages can be claimed either on the contract, or on a *quantum meruit*.

Herniman
v. Bawden,
3 Burr.
1844.

In a voyage from *England* to *Newfoundland*, and thence with fish to *Spain*, *Newfoundland* is not the delivering port; and if the ship is taken between *Newfoundland* and *Spain*, the mariner loses his wages.

Consolat.
del Mere
Moll Bk. 2.
c. 3. § 7.
(a) For this
Molloy cites
1 Ro. Abr.
530. but
nothing to
this effect
appears in
that page of
the book.
Minett v.
Robinson,
Bunb. 121.

If a ship be seized upon for debt, or otherwise become forfeited, the mariners must receive their wages, unless in some cases, where their wages are forfeited as well as the ship; or, if they have letters of marque, and instead of that they commit piracy, by reason of which there becomes a forfeiture of all. But (a) lading prohibited goods aboard a ship, as wool and the like, though it subjects the vessel to a forfeiture, yet it does not deprive the mariner of his wages, for the mariners having honestly performed their parts, the ship is tacitly obliged for their wages.

A. B. libelled in the Admiralty court, as administratrix to her husband, for his wages due as mariner on board the *Prince Frederick*. *Minett* and *Heys* moved for a prohibition, upon a suggestion, that this ship was seized for importing wines from *Holland*, not being *Rhenish* or *Hungarian* wines, and therefore forfeited by stat. 12 *Car.* 2.; that claim being put in by *Bowen* the master, an information was filed by the seizer, and *Bowen* pleaded the general issue; but before trial submitted, and compounded according to the course of the court; and upon payment of 136*l.* to the informer, there was judgment *quod vas deliberetur*, &c. It was likewise suggested, that the libel was for wages due before the seizure. Upon this motion it was insisted, that the act of parliament had so altered the property of the ship, that by the seizure, submission to a fine, and judgment *quod deliberetur*, upon it, all precedent incumbrances were discharged. But the court discharged the rule, though they admitted, if there had been a condemnation, that would have been a good ground for a prohibition, and a discharge of all precedent incumbrances. But the reporter adds a *quare*, for the fine implies a condemnation, although not actually given, but prevented by the submission.

By 2 *G.* 2. c. 36. made perpetual by 2 *G.* 3. c. 31. no masters of ships shall proceed on any voyage without first coming to an agreement with the mariners for their wages, which agreement shall be made in writing, declaring what wages each seaman or mariner is to have respectively during the whole voyage, or for so long time as he shall ship himself for, and shall also express the voyage for which such seaman was shipped, upon pain of forfeiting 5*l.* to the use of *Greenwich* Hospital.

§ 2.

This agreement every seaman shall sign within three days after he shall have entered himself; and so signed, it shall be conclusive to all parties for the time contracted for.

§ 3.

And any seaman deserting before or during the voyage, or refusing to proceed on the voyage, after he has signed such agreement, shall forfeit his wages; and further, upon complaint to

§ 4.

any.

any justice of the peace by the master or other person having charge of the ship, may be committed to the house of correction for any time not exceeding 30 days, nor less than 14.

If any seaman absent himself from the ship without the leave of the master or other chief officer having charge of the ship, he shall forfeit for every day's absence two days' pay to the use of *Greenwich* Hospital. § 5.

If any seaman, not entering into the king's service, leave the vessel, before he shall have a discharge in writing from the master or other person having the charge of the ship, he shall forfeit one month's pay. § 6.

On the arrival of any vessel in *Great Britain*, the master shall pay the seamen their wages, if demanded, in 30 days after the vessel's being entered at the custom-house, (except when a covenant shall be entered into to the contrary,) or at the time the seamen shall be discharged, which shall first happen, deducting out of the wages the penalties by this act imposed, under penalty of paying to such seamen that shall be unpaid 20*s.* over and above the wages, to be recovered as the wages may be recovered; and such payment shall be good in law, notwithstanding any action, bill of sale, attachment, or incumbrance whatsoever. § 7.

No seaman, by signing such contract, shall be deprived of using any means for the recovery of wages, which he may now lawfully use; and where it shall be requisite, that the contract in writing shall be produced in court, no obligation shall be upon any seaman to produce it, but on the master or owner of the ship; and no seaman shall fail in any action or process for the recovery of wages, for want of such contract being produced. § 8.

The masters or owners of ships shall have power to deduct out of the wages of any seaman all penalties incurred by this act, and to enter them in a book, and to make oath, if required, to the truth thereof; which book shall be signed by the master and two principal officers, belonging to such ship, setting forth, that the penalties contained in such book are the whole penalties stopped from any seaman during the voyage; which penalties (except the forfeitures of wages to the owners, on the desertion of any seaman, or on refusing to proceed on the voyage) shall go to the use of *Greenwich* Hospital, to be paid and accounted for by the masters of ships coming from beyond the seas, to the officer at any port who collects the 6*d.* per month deducted out of seamen's wages, for the use of the said Hospital, which officer is empowered to administer an oath to the master touching the truth of such penalties. § 9.

Any master or owner deducting the penalties as above, and not paying them to the officer collecting the 6*d.* per month in the port where the deduction shall be made, within three months after the deduction, shall forfeit treble the value to the use of the Hospital; which, together with the money deducted, shall be recovered by the same means as the penalties for not duly paying the 6*d.* per month. § 10.

By

By 8 G. 1. c. 24. § 7. (made perpetual by 2 G. 2. c. 28. § 7.) and also by 12 G. 2. c. 30. § 12. no master or owner of any merchant ship shall pay to any seaman beyond the seas any money or effects on account of wages, exceeding one moiety of the wages due at the time of such payment, till such ship shall return to *Great Britain, Ireland*, or the Plantations, or to some other of his Majesty's dominions, whereto she belongs, on forfeiture of double the money so paid, to be recovered in the high court of Admiralty by any person who shall first inform for the same.

Champion
v. Nicholas,
1 Str. 405.
at nisi prius
in Middle-
sex.

The cargo of a ship was lost by the capture of a *Swedish* privateer, who carried her into *Gottenburgh*: the master staid there three months to refit the ship, and take in new lading; and to prevent the seamen from going away, he agreed to pay them so much *per month*, whilst they staid there. In an action for this, the master would have discharged himself, on the rule that freight is the mother of wages, and that none are ever paid whilst the ship is lading and unlading; which the Chief Justice agreed to be the general doctrine; but he held it not sufficient to controul a special agreement, as there was in this case, and where too there was so long a stay at *Gottenburgh*.]

Winch. 8.
4 Inst. 141.
Vent. 146.
343.
3 Mod. 244.
Salk. 33.
pl. 4. &
vide 4 & 5
Ann. c. 16.

The mariners may sue in the Admiralty court for their wages, although the hiring was by the master on land; and this is allowed of in favour of navigation, for here they may all join in the same libel: also, by the law of the Admiralty, they have remedy against the ship and owners, as well as against the master; and it would be a great discouragement to seafaring-men to oblige them to bring separate actions, and those against a master who may happen to be insolvent.

Raym. 2.
Salk. 33.
pl. 5. Ld.
Raym. 397.
632. 2 Str. 858.

So, of the other officers under the master, as the mate, purser, boatswain, &c., for though they contract with the master, yet it is on the credit of the ship.

Roll. Abr.
533. [So,
a carpenter. 2 Str. 707.]

So, a shipwright may sue in the Admiralty for (a) making a ship.

6 Mod. 238.
2 Ld. Raym.
1044. S. C.
[2 Will.
265. S. C.
cited, and
approved
of by the
court.]

And if a contract be with seamen to go on a voyage, and they, in order thereunto, work in a harbour, and, after, the voyage be intercepted through the owner's fault, as, if the ship be arrested for his debt, &c. the seamen shall sue for their wages for the work done in the harbour, in pursuance of the contract to go on a voyage, in the Admiralty, as much as if they had gone the voyage: *secus*, if the retainer of them had been only to do the work in the harbour.

Ross v.
Walker,
2 Will. 264.

[But a pilot, though a mariner, who is sent for from *Gravesend*, and goes from thence on board a ship lying in *Sea-Reach*, and pilots her thence to her moorings at *Deptford*, cannot sue in the Admiralty for the pilotage; for both the contract and the work are within the body of a county.]

Salk. 31.
Opy v.
Addison.

So, if there be any special agreement, by which the mariners are to receive their wages in any other manner than is usual, or, if

if the agreement be under seal, the mariners cannot sue in the Admiralty. [2 Str. 968. Day v. Searle,

S. P. 2 Barnard. K. B. 419. S. C. Howe v. Napier, 4 Burr. 1944. S. P. But see Benne v. Parre, 2 Ld. Raym. 1206. and Roberts v. Cadd, Bunb. 247. Buggin v. Bennett, 4 Burr. 2035. Menetone v. Gibbons, 3 Term Rep. 267.]

Nor can the master sue in the Admiralty court; for his contract is on the credit of the owners (a), and not like that of the mariners, which is on the credit of the ship. 4 Inst. 141. Raym. 3. Salk. 33. pl. 4.

Carth. 518. S. P. although the owner was beyond sea, and the ship lay here; & vide 2 Salk. 548. pl. 3. [(a) Hence, the master has no lien on the ship for wages, stores, or repairs done in England. Wilkins v. Carmichael, Dougl. 101.]

[Therefore, where a man went out mate, and upon the death of the master during the voyage, succeeded to the command of the ship; and upon his return sued in the Admiralty for his wages as mate, and for a further allowance after he became master; the court granted a prohibition *quoad* the time he was master; and refused it *quoad* the time he was mate.] Reed v. Chapman, 2 Str. 937

(F) Of Average.

Whenever a ship is in stress of weather, or in danger, or just fear of (b) enemies, and the master, to save part of the cargo, throws overboard some of the goods in the ship, those which are saved shall contribute in proportion; and this common calamity shall be equally borne by all the parties interested. This is called general or gross average, and is allowed by the civil law, the customs of merchants, and our law. Molloy, 246, &c. 2 Bulst. 290. (b) So likewise, goods coming from infected towns or

places may be cast overboard. Molloy, 246.

[There is another species of average called small or petty averages. Petty average consists in such charges and disbursements, as, according to occurrences, and the custom of every place, the master necessarily furnishes for the benefit of the ship and cargo, either at the place of loading or unloading, or on the voyage. These charges are lodemange, or the hire of a pilot for conducting the vessel from one place to another; towage, pilotage, light-money, beaconage, anchorage, bridge-toll, quarantine, river charges, signals, instructions, passage-money by castles, expences for digging a ship out of ice when frozen up, that it may be brought into a proper harbour; and at London, by custom, the fee paid at Dover pier.

A third species of average, is that we are accustomed to meet with in bills of lading, "paying so much freight for the said goods, with primage or average accustomed." In this sense it signifies a small duty, which merchants, who send goods in the ships of other men, pay to the master, over and above the freight, for his care and attention to the goods so intrusted to him.]

In this contribution in general average, not only the master, owners, and freighters of the ship shall bear a proportionable share of the loss, but also passengers for such wares as they have in the ship. Molloy, 250.

ship. And passengers who have no wares or goods in the ship; yet, as they are a burden to the ship, estimate is to be made of their apparel, rings, and jewels, towards a contribution of the loss: and in general it is said, that every thing shall contribute, except the provisions of the ship, and the men who are necessary to work the ship.

Molloy,
247.

The master ought to be careful, that only those things of the least value and greatest weight be flung overboard: also, he and the crew (or most of them) must swear that the goods were cast overboard for no other cause but purely for the safety of the ship and lading.

Molloy,
249.

If, to avoid the danger of a storm, the master cuts down the masts and sails, and they falling into the sea are lost, this damage is to be made good by ship and lading, *pro rata*: otherwise, if the case happens by storm, or other casualties.

Molloy,
248.

Also, if through the rifling of the ship, casting overboard, and lightning the ship, any of the remaining goods are spoiled, either with wet or otherwise, those which are preserved must contribute towards the loss of the goods impaired, as well as to those which were entirely lost.

Da Costa v.
Newnham,
2 Term
Rep. 407.

[Where a ship is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading the cargo, and taking care of it, and the wages and provisions of the workmen hired for the repairs become general average.]

Molloy,
250, 251.

The goods saved and lost are to be estimated according as the goods saved were sold for, freight and other necessary charges being first deducted, and in such proportion the goods saved are to contribute.

Leg. Wisb.
Art.

[This rule is agreeable to the marine laws of *Wishbuy*, which declare, that the goods thrown overboard shall be brought into a gross average, and shall be rated at the same price for which other merchandize of the same sort, preserved from the sea or enemy, was sold. This custom mentioned by *Molloy* was certainly new in *England* at the time he wrote; for it appears by *Malyne*, that in 1622 the distinction was observed of estimating the goods at prime cost, if the jettison happened before half the voyage was performed: and if after, at the price the rest of the goods sold for at the place of discharge. However, the authority of *Molloy* is confirmed by *Magens*, who says, that the prevailing mode of settling averages now adopted in *England* is conformable to that rule, which has abolished the distinction.

Molloy, tit.
Average,
§ 4.
1 Mag. 62.

In *England*, money and jewels fall into the general average at their full price.

Peters v. Miligan, Sitings at Guildhall, 1787. *coram* Buller, J.

Peters v.
Miligan and
others, at
Guildhall,
coram Bul-
ler, J. Dec.
19th, 1787.

A special action on the case was brought by the owners of a packet hired by government against defendants, who were the shippers of bullion from the *West Indies* to this country, for their proportion of general average arising from a loss by cutting away a mast. A bill of lading was given by the captain at the time he received the bullion. It appeared that merchant ships take less for the

the conveyance of this article than packets, and these than men of war. Packets are allowed by government to receive bullion on board, but captains of men of war are prohibited. Packets however are considered as king's ships, they are under martial law. It appeared also that bullion on board merchant ships always contributes to general average. But no particular instances were in proof of such an accident having happened to a packet with bullion on board, on which the general question could arise. But several witnesses declared that they never heard of such a demand, and they were likely to have known it, if it ever had been made.—

Bearcroft for plaintiff in his reply contended, that this being a new question in a court, it was as much in his favour as against him; for perhaps the demand was never before resisted. Wherever a bill of lading is given, it must be for *cargo*, and cargo is always subject to general average. This must be considered as cargo, and though packets are not allowed to carry cargo in general, yet *quoad* bullion they are. *Buller, J.*—There is a point arising in this cause, and it is the only one which I can leave to the jury, which is new in a court of justice; therefore it is necessary to state it precisely: the only question then is, whether any usage in the particular case of packets has made an exception out of the general law with regard to general average? for as to the general law there can be no doubt but that bullion is subject to average like any other cargo paying freight. Before I come to the evidence on this subject, I shall lay two circumstances out of the case: 1st, That though a captain of a man of war takes bullion on board, yet he does not receive any freight for it as such, and if he does receive a reward for doing so, it is against positive orders. 2d, The difference of the premiums of insurance between packets and merchantmen with bullion on board, because the motive of the underwriter in requiring less in the one than in the other case, is, because the former is more secure and better manned than the latter. There can be no doubt but that specie is liable to general average. The law upon this subject has been diligently and ably collected by a gentleman who has lately written on the subject of insurance. Every thing which pays freight must be liable to general average. A packet does carry bullion for freight; the captain gives bills of lading; government receives one-third of the freight; the owner another third, and the captain the third share. The cargo of every vessel carrying for freight must equally be liable to general average, whether employed by government or a subject: there can be no difference. Then the question arises, whether there is any usage in this case to vary the general law. This is the material consideration. It has been said by the witnesses, that they never heard of any instance similar to the present, in which such a demand has been made. Whether negative usage ought to weigh or not, depends very much upon the subject to which it is applied. In cases of this sort, where accidents must frequently have happened, negative usage of non-claim is very strong. Captain *Bull*, of one of the packets, has said, that very many instances have happened

Mr. Park;

pened of packets cutting away their masts. Now it must frequently have happened that bullion was on board in such cases. There are now 30 packets employed every year by government, and many have been so at least from the time of *Queen Anne*, but I cannot now say at what time they were set up. Captain *Braithwaite* says, that they have larger freight for carrying bullion in the packets from *Lisbon* than the merchantmen have, because the packets are a safer mode of conveyance; but the reason given by Captain *Bull* for the difference is, because there is no general average allowed in that case. Then Mr. *Etherege*, who is clerk of the bullion office in the Bank, says, that he never knew of a demand of this sort in the case of a packet, and he thinks he must have known it if there had; but he has always known it done in the case of merchantmen.—Verdict for defendant by a special jury.]

Molloy,
250.

If a master of a ship lets out his ship to freight, and then receives his compliment, and afterwards takes in goods without leave of the freighters, and a storm arises at sea, and part of the freighters' goods are cast overboard, the remaining goods are not subject to the average, but the master must make good the loss out of his own purse.

Moor, 297.

Also, average is not due, unless the goods are lost in such a manner, that thereby the residue in the ship are saved; as, if goods are thrown overboard to lighten the ship, or, by composition, part is given to a pirate to save the rest; but, if a pirate takes part by violence, average shall not be paid for them.

Show. Par.
Cases, 18,
19. and
affirmed in
parliament.

So, where *A.* being one of the owners of a ship, loaded on board her 210 tons of oil, and *B.* loaded on board her 80 bales of silk upon a freight, by contract, both to be delivered at *London*; the ship was pursued by enemies and forced into an harbour, &c. and the master ordered the silk on shore, being the most valuable commodity, though they lay under the oils, and took up a great deal of time to get at them; the ship and oils were afterwards taken, and the owner of the oils brought his bill in equity to have contribution from the owner of the silk; in this case, as the loss of the oils did not save the silks, nor the saving the silks lose the oils, the bill was dismissed.

Molloy,
249.

Hard. 183.

(a) And as
he may ransom
from the ship
and goods,
so may he
retain the
goods for his
satisfaction

If a ship happens to be taken, and the master, to redeem the ship and lading out of the enemies or pirates hands, promises a certain sum of money, for performance whereof he himself becomes a pledge or captive in the custody of the captor; in this case he is to be redeemed at the costs and charges of the ship and lading, and all are to be contributory for his (a) ransom according to each man's interest.

in the same manner as he may detain the goods for freight; but if he once suffers them out of his possession, he cannot afterwards retake them. 6 Mod. 12, 13. [But now by stat. 22 Geo. 3. c. 25. "it shall not be lawful for any of his Majesty's subjects to ransom, or to enter into any contract or agreement for ransoming any ship or vessel belonging to any of his Majesty's subjects, or any merchandize or goods on board the same, which shall be captured by the subjects of any state at war with his Majesty, or by any persons committing hostilities against any of his Majesty's subjects. And all contracts and agreements entered into, and all bills, notes, and other securities given for such purposes are declared void, and the offender is subject to a penalty of five hundred pounds."]

So,

So, where a pirate takes part of the goods to spare the rest, contribution must be paid ; but if a pirate takes by violence part of the goods, the rest are not subject to average, unless the merchant hath made an exprefs agreement to pay it after the ship is robbed.

Moor, 297.
Molloy,
249.

If *A.* and several others take their passage in a ferry-boat, and being upon the water, a tempest arises, so that they are in danger of being drowned ; upon which, to preserve their lives, several of the goods are cast overboard, among which a pack of goods of *A.*'s of great value is thrown over ; in this case, there shall be no average, but the ferryman must answer for the goods ; because, for his hire, he runs the venture of the voyage.

Allen, 93.
2 Buif. 280.
12 Co. 62.

(G) Of Hypothecation.

IF a ship be at sea, and spring a leak, or be otherwise in danger of being lost, or the voyage be defeated for want of provisions or other necessaries ; in these cases of extremity, the master may pledge or hypothecate the ship and goods, or (*a*) either of them, for such necessaries as are wanting, which power is implicitly given him in (*b*) constituting him master, and which he may exercise, rather than that the ship should be lost, or the voyage defeated.

Roll. Abr.
53.
Hob. 11.
Moor, 918.
That it is so
by the laws
of C e n,
of which
our law
takes notice.

Molloy, 213. (*a*) The master may hypothecate either ship or goods, for the master is entrusted with both, and represents the traders as well as owners of the ship. Saik. 34. pl. 7. 2 Ld. Raym. 805. (*b*) That he who is deputed master may do the same. Noy, 95.

The master cannot hypothecate the ship or goods for any debt of his own, nor in any case, but for the preservation of the ship and completing of the voyage.

Molloy,
213.

Also, the master cannot (*c*) sell the ship and broken tackle, though there is no probability of its being saved, partly in respect of the tempest, and partly in respect of the barbarity of the inhabitants, who took away every thing that was cast on the shore.

Sid 453.
per Hale.
(c) But if
he cannot
hypothecate,
he may sell

so much of the lading as is necessary, &c. Molloy, 214.

If the vessel happens to be wrecked or cast away, and the mariners, by their great pains and care, recover some of the ruins and lading, the master, in that case, may pledge the same, and distribute the money among the mariners, or so much as shall be necessary to the defraying of their expences to their own country : but if the mariners noway contributed to the salvage, then their reward is sunk and lost with the vessel ; and if there be any considerable part of the lading preserved, he ought not to dismiss his mariners till advice from the laders or freighters.

Molloy,
214.

But although hypothecation of ships be absolutely necessary for navigation, without which masters could not get credit abroad ; yet a master cannot make the owner (*d*) personally liable by any contract of his ; but (*e*) the ship and cargo shall be liable where he hypothecates for necessaries, although such necessaries were not actually employed or laid out in the service of the ship or voyage,

(d) 6 Mod.
79. 2 Sid.
161. Saik.
35. pl. 9.
cont. [How-
ever, what
is said by
Ld. Hard-

wickein the and the owners and freighters must take their remedy against the
 case of Bux- master.
 ton v. Ince,
 1 Vez. 156. and the decision of the Master of the Rolls in *Samsun v. Braginton*, 1 Vez. 443. support
 the doctrine in the text.] (c) Noy, 25.

Molloy, The master can only hypothecate, where the calamity of want
 214. of necessaries happened after the ship had put to sea; and there-
 6 Mod. 70. fore the Admiralty court is allowed to have jurisdiction herein,
 [2 P. Wms. so far as to subject the ship, but cannot proceed against the person
 367. 2 Str. otherwise, than as it is necessary to make him party towards the
 695. 1 Atk. condemnation of the ship.
 234.] & vide
 2 Vern. 643.

Salk. 34. And therefore where *A.* contracted with *B.* for a cable, which
 pl. 7. he delivered at *Ratcliff-upon-Thames*, and *B.* sued in the Admiralty,
 3 Mod. 244. a prohibition was granted; though it was insisted, that the want
 6 Mod. 12. of the cable was occasioned by the stress of the weather and sea;
 25. 77. for here the contract was at land, and a remedy for the breach at
 [Menetone common law: but had the hypothecation been at *Rotterdam*, or
 v. Gibbons, any other foreign port, the remedy had been proper in the Ad-
 3 Term miralty court. [For that court has cognizance of an hypotheca-
 Rep. 267.] tion bond given in the course of a voyage, though it be executed
 upon land, and under seal.]

(H) Of Charter-Parties.

Molloy, A Charter-party is an agreement by indenture, whereby the
 227., &c. owners, master, and freighters of a ship covenant with each
 2 Vent. 196. other, that such a ship shall be fit and ready to sail, take in such
 Style, 133. and such lading, carry and transport the same to such place or
 2 Show. 324. places, in consideration whereof the freighters or merchants are
 Palm. 399. to pay so much, &c. and such charter-party, being only a cove-
 2 Roll. nant or agreement, shall be construed according to the intention
 Abr. 248. of the parties, and the usual customs of merchants.
 pl. 10.
 Poph. 161.

2 Inst. 673. An indenture of charter-party was made between *Scudamore* and
 2 Lev. 74. others, owners of the good ship called *B.*, whereof *Robert Pitman*
 S. C. cited, was master, of the one part, and *Vandestene* of the other part; in
 and admitted which indenture the plaintiff covenanted with the said *Vandestene*
 to be law. and *Robert Pitman*; and also *Vandestene* covenanted with the plain-
 (a) Lev. 235. tiff and *Robert Pitman*, and bound themselves to the plaintiff and
Robert Pitman for the performance of covenants in 600*l.*, and
 the conclusion of the said indenture was, *In witness whereof the*
parties aforesaid to these present indentures have put their seals; and
 the said *Robert Pitman* to the said indenture put his hand and seal;
 and delivered the same: the defendant, in bar of the said action,
 pleaded the release of *Pitman*, &c. whereupon the plaintiff de-
 murred; and it was adjudged, that the release of *Pitman* did not
 bar the plaintiff, because he was no (a) party to the indenture;
 and the diversity was taken and agreed between an indenture re-
 ciprocally between parties on one side, and parties on the other
 side, as this was; for, there, no bond, covenant, or grant, can be
 made to, or with, any that is not party to the deed; but where
 the

the deed indented is not reciprocal, but is without a *between*, &c. as *omnibus Christi fidelibus*, &c. there, a bond, covenant, or grant may be made to divers several persons.

So, where an action was brought on a charter-party, which was in this manner: *This indented charter-party witnesseth, that Binley, master, and part-owner of the ship, with consent of Cooker, the other part-owner, hath let the ship to Child for such a voyage, and Child covenants with Binley, nec non with Cooker to pay 300 l. Cooker brings the action, and the defendant Child pleads, that only he and Binley were the parties to and sealed the indenture; whereupon the plaintiff demurred; Et per totam curiam*, though the deed be indented, yet, not being *inter partes*, there may be a covenant with a stranger, as if it were a deed poll, or in the first person, *Know ye that I*, &c.: otherwise, where the deed is between parties, then no one, that is a stranger, can take advantage thereof by way of action.

2 Lev. 74.
3 Keb. 94.
115. Cooker
v. Child.
3 Lev. 139.
S. C. cited.

In an action on a charter-party a breach must be assigned, which the party may do in the very words of the agreement; and, if there be any thing to be done by the plaintiff, which, in the nature of the thing, is *necessary to enable the defendant to perform his part* of the agreement, if the plaintiff hath not done his part, this will excuse the defendant's omission.

Videtit. Co-
venants,
Letter (L)
and 2 Jon.
216.

[In covenant on a charter-party, whereby it was agreed to employ a ship of which the plaintiff was captor, as soon as sentence of condemnation should have passed, the sentence must be taken to mean a *legal* sentence, and the party who sues for the freight must aver, that the ship was condemned by a court having competent jurisdiction.]

Unwin v.
Wolfeley,
1 Term Rep.
674.

If, in an action of covenant, the plaintiff declares upon a charter-party, by which the plaintiff, being master of a ship, was to pay two parts of the port-charges, and the factor of the defendant the other part; and the plaintiff shews, that he sailed from *L.* to *C.* and there paid all the port-charges, *viz.* two parts for himself, and the other part for the defendant; and that the defendant had not repaid him; this breach is well assigned; for when the plaintiff says he paid the third part, it shall not be intended the defendant did, but that the plaintiff was necessitated to pay it, otherwise his ship would be staid in the port.

2 Jon. 186.
Bellamy v.
Ruffel.

[If there be a covenant in a charter-party, that no claim shall be admitted or allowance made for short tonnage, unless such short tonnage be found and made to appear on the ship's arrival, on a survey to be taken by four shipwrights to be indifferently chosen by both parties; this is not a condition precedent to the plaintiff's right of recovering for short tonnage, but is a matter of defence to be taken advantage of by the defendant; and, consequently, the not averring performance can be no ground for arresting the judgment.]

Hottham v.
East India
Company,
1 Term Rep.
638.

If *A.* covenants to pay 3 *l.* per ton for goods imported, and for performance thereof binds himself in a penalty, and in an action thereupon, the plaintiff assigns for breach the nonpayment for so many tons, and a hogthead, which came to so much; this is

2 Lev. 124.
Allen, 9.
S. P.

(a) If goods are sent abroad generally the freight must be according to freight for the like accustomed voyage. Molloy, 232.—And if a ship be freighted for 200 tons or thereabouts, the addition of *thereabouts* is commonly reduced to be within five tons, more or less, as the moiety of the number *ten*, whereof the whole number is compounded. Molloy, 232.

2 Vern. 210. (b) If a charter be so worded, that there can be no remedy thereon at law, yet the party having a just demand may be relieved in equity; as, where by the agreement there was no freight to be paid for the outward-bound cargo, and when the ship arrived beyond sea, the factor had no goods at all to load the ship with; the court decreed payment of the freight.

212. [(b) But Lord Mansfield, speaking of this very instrument, says, "In construing arguments, I know of no difference between a court of equity and a court of law. A court of equity cannot make an agreement for the parties; it can only explain what their true meaning was, and that is also the duty of a court of law." Dougl. 277.]

3 Vern. 727. So, where the *East India* Company took bonds from the mariners and officers of a ship not to demand their wages, unless the ship returned to the port in *London*; and the ship arrived at a delivering port, and was afterwards taken by the *French*; it was held by my Lord Chief Justice *Holt*, in an action tried by him, and likewise in Chancery, that the seamen and officers should have their wages, to the time of the arrival of the ship at the delivering port.

2 Vern. 242. The plaintiff, a merchant in *London*, hired the defendant's ship to freight for a voyage to *Bourdeaux*, at 3 *l.* 10 *s.* a ton: it happened, that an embargo was laid on all merchant ships for six weeks: the ship afterwards proceeded on her voyage to *Bourdeaux*; and the defendant not discovering what agreement he had made with the plaintiff in *England*, the plaintiff's factors and correspondents there agreed to allow the defendant 6 *l.* 10 *s.* per ton, upon which latter agreement, the defendant recovered at law. A bill being exhibited for relief against this second and underhand agreement, obtained, as was alleged, by fraud, was dismissed; for the defendant was at liberty to make a new agreement, by reason that the performance of the first was obstructed by the embargo after laid on all merchant ships.

2 Chan. Ca. 258. A master of a ship, without the owner, treated with the plaintiff, a merchant, for the freight of the ship at 80 tons, and accordingly entered into a charter-party with him to sail from *London* to *Falmouth*, and thence to *Barcelona*, without altering the voyage, and there to unlade at a certain rate per ton; and for performance, the master binds the ship, tackle, &c. valued at 300 *l.* the master deviates, and commits barratry, by which the merchant in effect loseth his voyage and goods. The merchant had a sentence against the master and ship in *Barcelona*, which was confirmed in a higher court in *Spain*; and the owner having brought trover for the ship, the merchant exhibited his bill to be relieved against this action, and likewise another action brought for freight: it was held by my Lord Chancellour, that the charter-party having valued the ship at a certain rate, the owner is not liable further, and the master is liable for deviation and barratry;

for should it be otherwise, masters would be owners of all men's ships and estates.

If a charter-party be made in *England*, to do certain things in several places on the sea, though no act is to be done in *England*, but all upon the sea; yet no suit can be in the Admiralty court for the nonperformance of the agreement, for the contract is the original, without which no cause of suit can be; and this contract is out of their jurisdiction; for where a part is triable by the common law, and part by the admiral law, the common law shall be preferred.

[Freighters of ships under charter-parties with the *East India* Company, are not answerable for *damage*, or *loss*, occasioned by the act of God. The expression *ship-damage*, in those charter-parties, means, damage from negligence, insufficiency, or bad stowage in the ship.]

(I) Of Policies of Insurance; [and herein,

1. Of Marine Insurances.]

[**A**SSURANCE or insurance signifies a contract or agreement whereby one or more persons, called insurers or assurers, oblige themselves to answer for the loss of a ship, house, goods, &c. specified in an instrument subscribed by them, in consideration of a premium of a stipulated sum *per cent.* paid by the proprietors of the things insured.

The instrument by which this contract of indemnity is effected, is called a Policy. It is signed only by the insurer, who, on that account, is denominated an underwriter. Notwithstanding this, there are certain conditions to be performed as well by the person not subscribing, as by the underwriter, else the policy will be void.

Of policies there seem to be two sorts, *valued* and *open* policies; and the only difference between them is, that in the former, goods or property insured are valued at prime cost, at the time of effecting the policy; in the latter, the value is not mentioned: that in the case of an open policy, the real value must be proved; in a valued policy it is agreed, and is just as if the parties had admitted it at the trial.

Although policies of insurance are not to be ranked with specialty contracts, not being under seal, yet they have always been holden as sacred agreements. The courts therefore will very reluctantly admit of any alteration in them. They may indeed be altered by the consent of the parties (*a*) after they are signed; but the courts will never vary or depart from the written words, but upon the strongest and most satisfactory evidence that the meaning of the parties has been mistaken (*b*).

Motteux v. Governor and Company of the London Assurance,

By the common law and usage of merchants, any person might be an insurer. But the statute of 6 G. 1. c. 18. (by which the crown was authorized to create two distinct corporations for the purpose of insuring, which corporations are since known by the names

Roll. Abr.
532.
Ro. l. Rep.
486. S. C.
4 Inst. 135.
139 142.
Hob. 212.
Moor, 450.
like point.

Dougl. 272.

2 Saund.
200.

Park, 1.

2 Burr.
1171.

Park, 1.
Skin. 54.
(a) Bates v.
G. aham,
2 Salk. 444.
(b) Henkle
v. Royal
Exchange
Assurance
Company,
1 Vez. 317.
1 Atk. 545.

The pro-
jectors of
these com-
panies had
been very

industrious to bespeak the countenance of the House of Commons, for which they had caused two letters to be printed and given to the members. But these, and all other solicitations having proved ineffectual, they had recourse to other expedients; and, understanding that the civil list was considerably in arrears, (for which no provision had been, or could be conveniently made by the parliament, because the grand committee of supply had been inadvertently dismissed,) they offered to the ministry 600,000*l.* towards the discharge of that debt, in case they might obtain the king's charter, with the parliamentary sanction for the establishment of these companies. This offer the ministry, who were at a loss for means to pay the civil list debt, readily embraced; and, Mr. Craggs having prepared the leading members of the House of Commons, Mr.

of the *Royal Exchange Assurance Office*, and the *London Assurance Office*), has somewhat restrained this common law right: for by § 12. of that statute it is enacted, “that from and after the granting or making the said charters or indentures for making the two corporations above mentioned, and passing the same under the great seal, for and during the continuance of the said corporations respectively, or either of them, all other corporations or bodies politick, before this time erected or established, or hereafter to be erected or established, whether such corporations or bodies politick, or any of them, be sole or aggregate, and all such societies and partnerships as now are, or hereafter shall or may be, entered into by any person or persons, for assuring ships or merchandizes at sea, or for lending money on bottomry, shall, by force and virtue of this act, be restrained from granting, signing, or underwriting any policy of assurance, or making any contracts for assurance of or upon any ship or ships, goods, or merchandizes, at sea, or going to sea, and for lending any monies by way of bottomry as aforesaid: and if any corporation or body politick, or persons acting in such society or partnership, (other than the two corporations intended to be established by this act, or one of them,) shall presume to grant, sign, or underwrite, after the twenty-fourth day of *June* 1720, any such policy or policies, or make any such contract or contracts for assurance of or upon any ship or ships, goods, or merchandizes, at sea or going to sea, or take or agree to take any premium or other reward for such policy or policies, every such policy and policies of assurance of or upon any such ship or ships, goods or merchandizes, shall be *ipso facto* void, and all and every such sum or sums so signed and underwritten in such policy or policies shall be forfeited, and shall and may be recovered, one half to the use of his majesty, the other to that of the informer, by action: and if any corporation or bodies politick, or persons acting in such society or partnership, other than the two corporations intended to be erected by this act, or one of them, shall presume to lend, or agree to lend, or advance, by themselves or any others on their behalf, after the said twenty-fourth day of *June* 1720, any money by way of bottomry contrary to this act, the bond or other security for the same shall be *ipso facto* void, and such agreement shall be adjudged to be an usurious contract, and the offenders therein shall suffer as in cases of usury: nevertheless, it is intended and hereby declared, that any private or particular person or persons shall be at liberty to write or underwrite any policies, or engage himself or herself in any assurances of, for, or upon any ship or ships, goods or merchandizes, at sea or going to sea, or may lend money by way of bottomry, as fully and beneficially, as if this act had never been made, so as the same be not on the account or risk of a corporation or body politick, or upon the account or risk of persons acting in a society or partnership for that purpose as aforesaid.”

Affable, on the 4th of May 1720, presented a message from the King, recommending the establishment of these companies; in pursuance of which this act was passed.

Upon this clause of the statute, a question lately arose at *Guildhall*. It was an action brought to recover a sum of money received by the defendant from one *Bristow* to the plaintiff's use. The plaintiff was an underwriter, and the defendant was a broker, and a loss having happened upon a policy underwritten by the plaintiff, he had been obliged to pay it: but *Bristow*, having agreed to take half the plaintiff's risk, had paid his moiety of the loss into the hands of the defendant, to recover it from whom this action was brought. Lord *Kennyon*—I am of opinion that the plaintiff cannot recover, for this is clearly a partnership within the act of parliament. If a single name appears upon the policy, as in this case, the insurer shall never be allowed, if a loss happen, to defeat a *bona fide* insurance by saying to an innocent man, there was a secret partnership between another and myself, and therefore the policy is void. But here, the plaintiff is himself the underwriter, who comes to enforce the contract: it is a partnership *pro hac vice*; and this party cannot apply to a court of justice to enforce a contract founded on a breach of the law.

Sullivan v. Greaves, Sittings after Easter, 1789, Park, 8. No motion was ever made to set aside the nonsuit: but two or three days after, Lord *Kennyon* mentioned to the bar, that he had stated the case to the other judges of the court of King's Bench, who were unanimously of

the same opinion with him. And this opinion has been since farther confirmed by a decision of the court of Common Pleas in the case of *Mitchel v. Cockburn*, 2 H. Bl. 379., and of the court of King's Bench in *Booth v. Hodgson*, 6 Term Rep. 405.

With respect to the subjects of the policy, the most frequent are ships, goods, merchandizes, the freight or hire of ships: also, houses, warehouses, and the goods laid up in them from danger by fire, and insurance upon lives. Bottomry and *respondentia* may also be the subject of insurance. But then it must be particularly expressed in the policy to be *respondentia* interest; for under a general insurance (a) on goods and merchandizes, the party insured cannot recover money lent upon bottomry. Not (b) but that money expended by the captain for the use of the ship, and for which *respondentia* interest is charged, may be recovered under an insurance upon goods, specie, and effects, provided the usage of the trade, which in matters of insurance is always of great weight, sanctions it.

Park, 9.

(a) *Glover v. Black*, 3 Burr. 1394. 1 Bl. Rep. 405. S. C. (b) *Gregory v. Christie*, B. R. Tr. 24 Geo. 3. Park, 11. 1 Mag. 19.

Although insurances upon the wages of mariners are in general for very wise reasons forbidden; yet this regulation does not mean to prevent them from insuring those wages, which they are entitled to receive abroad, or goods which they have purchased with those wages in order to bring home; for in such a case, they are to be considered in the same light with other men.

In an action upon a policy of insurance upon *Fort Marlborough*, otherwise *Bencoolen*, in the *East Indies*, for twelve calendar months, from the first of *October* 1759, to the first of *October* 1760, against any *European* enemy, for the benefit of the governor, it was doubted by Lord *Mansfield*, who tried that cause, whether a policy against the loss of *Fort Marlborough* for the benefit of the governor was good, upon the principle which does not allow a sailor to insure his wages. But afterwards, when he came to deliver the opinion of the court upon all the points in that cause, after mentioning

Carter v. Boehm, 3 Burr. 1905. and 1 Bl. Rep. 593.

this doubt, which had occurred to his mind, he went on thus :
 “ But, considering that this place, though called a fort, was really
 “ but a factory or settlement for trade ; and that he, though
 “ called a governor, was really but a merchant ; considering
 “ too, that the law allows a captain of a ship to insure goods
 “ which he has on board, or his share in the ship, if he be a part
 “ owner ; and the captain of a privateer, if he be a part owner,
 “ to insure his share ; considering too, that the objection
 “ could not, upon any ground of justice, be made by the insurer,
 “ who knew him to be the governor, at the time he took the
 “ premium ; and as with regard to principles of publick convenience, the case so seldom happens, (I never knew one before,) any danger from the example is little to be apprehended, I did not think myself warranted, upon that point, to nonsuit the plaintiff ; especially too, as the objection did not come from the bar. Though this point was mentioned, it was not insisted upon at the last trial ; nor has it been seriously argued, upon this motion, as sufficient alone to vacate the policy : and if it had, we are all of opinion, that we are not warranted to say, that it is void upon that account.”

It is enacted by stat. 28 G. 3. c. 56. “ That it shall not be lawful for any person or persons to make or effect, or cause to be made or effected, any policy of assurance on any ship or vessel, or upon any goods, merchandizes, effects, or other property whatsoever, without first inserting or causing to be inserted in such policy the name or names, or the usual style and firm of dealing of one or more of the persons interested in such assurance, or without instead thereof first inserting the name or names, or the usual style and firm of dealing of the consignor or consignors, consignee or consignees, of the goods or property so to be inserted, or the name or names, or the usual style and firm of dealing of the person or persons residing in *Great Britain* who shall receive the order for and effect such policy, or of the person or persons who shall give the order or direction, the agent or agents immediately employed to negotiate or effect such policy.” The statute further declares, that “ every policy made or underwritten contrary to the true intent and meaning of this act, shall be null and void to all intents and purposes.”

An insurance generally “ *upon any ship or ships*” effected from a particular place is valid ; and the insured has a right to cover any ship he may think proper, that falls within the terms of it.

Nor do the owners of goods insured preclude themselves by shifting the goods from one ship to another from recovering an average loss arising from the capture of the second ship, if they acted from necessity, and for the benefit of all concerned.

An action was brought upon a policy of insurance of the captain's goods for six months certain. The loss proved was chiefly for goods lashed on deck, and the captain's clothes, and the ship's provisions. It was proved by an underwriter and a broker, that
 none

Kewley v.
Ryan, 2 H.
Bl. 343.
Henchman
v. Offy, *Id.* 345 note.

Plantamour
v. Staples,
1 Term Rep.
611. note.

Ross v.
Thwaite.
Sittings after
Hil. 15 G. 3
at Cullenhall,
Park, 21.

none of those things are within a general policy on goods; for the risk was greater as to goods lashed on deck, than other goods: and a policy on goods means only such goods as are merchantable, and a part of the cargo. They also swore, that when goods like the present are meant to be insured, they are always insured by name; and the premium is greater.

Lord *Mansfield* said, he thought it consistent with reason; and understood the usage to be so: therefore he advised the plaintiff to withdraw a juror, the premium having been paid into court, to which he consented.

Where the owner of the goods insured brought down *his own* *Sparrow & Carruthers*, received the goods out of the ship, and before they reached land, an accident happened, whereby the goods were damaged, a special jury of merchants, under the express direction of Lord Chief Justice *Lee*, found that the insurer was discharged, although the insurance was upon goods to *London*, and till the same should be safely landed there. *2 Str. 1236.* The case turned upon the goods not being sent by the ship's boat, which is considered as part of the ship and voyage.

By 35 Geo. 3. c. 63. which repeals all former duties upon policies of insurance, it is enacted, "That for every skin, or piece of vellum, or parchment, or sheet of paper, on which any insurance upon any ship or ships, goods or merchandize, or upon any other property or interest whereon insurances may lawfully be made, shall be engrossed, written, or stamped, the stamp duties following upon the sums insured, that is to say, where the sum to be insured shall amount to 100*l.*, a stamp duty of 2*s.* 6*d.*, and so progressively for every sum of 100*l.* insured; and where the sum to be insured shall not amount to 100*l.*, a like stamp duty of 2*s.* 6*d.*; and where the sum to be insured shall exceed 100*l.*, or any progressive sums of 100*l.* each, by any fractional part of 100*l.*, a like stamp duty of 2*s.* 6*d.* for each fractional part of 100*l.*; and that upon all and every insurances or insurance, where the premium, or consideration in the nature of a premium, actually and *bonâ fide* paid, given, or contracted for, shall not exceed the rate of 10*s.*, there shall be paid the following duties; that is to say, where the sum so to be insured shall amount to 100*l.* a stamp duty of 1*s.* 3*d.* and so progressively for every sum of 100*l.* so insured; and where the sum so to be insured shall not amount to 100*l.*, a like stamp duty of 1*s.* 3*d.*; and where the sum so to be insured shall exceed 100*l.*, or any progressive sums of 100*l.* each, by any fractional part of 100*l.*, a like stamp duty of 1*s.* 3*d.* for such fractional part of 100*l.*, which several sums shall be payable and paid by the assured in such insurances respectively."

"Provided, that upon every such insurance, where the premium or consideration in the nature of a premium, actually and *bonâ fide* paid, given, or contracted for, shall not exceed the rate of 10*s.* per centum on the sum insured, it shall be lawful where the sum insured shall amount to 200*l.* or upwards, to use stamps of 2*s.* 6*d.* for every 200*l.* of the sum insured, instead of stamps of 1*s.* 3*d.* for every 100*l.* of the like sum insured."

"Every

§ 11.

“ Every contract or agreement which shall be made or entered into for any insurance, in respect whereof any duty is by this act made payable, shall be engrossed, printed, or written, and shall be deemed and called a *policy of insurance*; and the premium, or consideration in the nature of a premium, paid, given, or contracted for, upon such insurance, and the particular risk or adventure insured against, together with the names of the subscribers and underwriters, and sums insured, shall be respectively expressed or specified in or upon such policy, and in default thereof every such insurance shall be null and void to all intents and purposes whatever.”

§ 12.

“ And no policy of insurance upon any ship, or upon any share or interest therein, shall be made for any certain term longer than twelve calendar months; and every policy which shall be made for any longer term shall be null and void to all intents and purposes.”

The 10th section provides for an allowance to be made under certain circumstances by the commissioners, where the sums insured on homeward voyages shall exceed the interest of the assured.

The 13th section provides, that nothing contained in the act shall prohibit the making of any alteration which may lawfully be made in the terms or conditions of any policy of insurance, duly stamped as aforesaid, after the same shall have been underwritten, or to require any additional stamp duty by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or contracted for shall exceed the rate of 10 s. *per cent.* on the sum insured, and so that the thing insured shall remain the property of the same person or persons, and so that such alteration shall not prolong the term insured beyond the period allowed by § 12. of this act, and so that no additional or further sum shall be insured by reason or means of such alteration.

§ 15.

A penalty of 500 l. is imposed both upon the persons procuring, and the brokers effecting insurances on policies not duly stamped;

§ 16.

and the latter can neither demand their brokerage, nor the money

§ 17.

expended for premiums; and every underwriter subscribing such illegal policy, is liable to a like penalty of 500 l.

Anon. Skin,
243.

A policy of insurance shall be construed to run until the ship shall have ended, and be discharged of her voyage; for arrival at the port, to which she was bound, is not a discharge *till she is unloaded*: and it was so adjudged by the whole court, upon a demurrer.

Lockyer v.
Offley,
1 Term Rep.
252.

But although this construction may be perfectly right, where the policy is general from *A.* to *B.*, yet if it contain the words usually inserted “ *and till the ship shall have moored at anchor twenty-four hours in good safety,*” the underwriter is not liable for any loss, arising from seizure after she has been twenty-four hours in port; though such seizure was in consequence of an act of barratry of the master *during the voyage*, for, if it were extended beyond the time

time limited in the policy, it would be impossible to lay down any fixed rule, and all would be uncertainty and confusion.

In an action upon a policy of insurance by the defendant at *London*, insuring a ship from thence to the *East Indies*, warranted to depart with convoy, the declaration shewed, that the ship went from *London* to the *Downs*, and from thence with convoy, and was lost. After a frivolous plea and demurrer, the case stood upon the declaration, and it was objected, that there was a departure without convoy. But by the court, the clause "warranted to depart with convoy," must be construed according to the usage among merchants, that is, from such place where convoys are to be had, *as the Downs*.

Lethulier's
case, 2 Salk.
443.

Case upon a policy of insurance, which was to insure the *William* galley in a voyage from *Bremen* to the port of *London*, warranted to depart with convoy. The case was, the galley set sail from *Bremen*, under convoy of a *Dutch* man of war to the *Elbe*, where they were joined by two other *Dutch* men of war, and several *Dutch* and *English* merchant ships, whence they sailed to the *Texel*, where they found a squadron of *English* men of war and an admiral. After a stay of nine weeks, they set sail from the *Texel*; the galley was separated in a storm, taken by a *French* privateer, and retaken by a *Dutch* privateer, and paid eighty pounds salvage. It was ruled by *Holt*, Chief Justice, that the voyage ought to be according to *usage*, and that their going to the *Elbe*, though out of the way, was no deviation; for till after the year 1703, (prior to which time this policy was made,) there was no convoy for ships directly from *Bremen* to *London*. Verdict for the plaintiff.

Bond v.
Gonfales,
2 Salk. 445.

The ship *Success* was insured "at and from Leghorn to the port of *London*, and till there moored twenty-four hours in good safety." She arrived the 8th of *July* at *Fresh Wharf* and moored, but was the same day served with an order to go back to the *Hope* to perform a fourteen days quarantine. The men upon this deserted her, and on the 12th of the month the captain applied to be excused going back, which petition was adjourned to the twenty-eighth, when the regency ordered her back; and on the thirtieth, she went back, performed the quarantine, and then sent up for orders to air the goods; but before she returned, the ship was burnt on the twenty-third of *August*. The question was, therefore, whether the insurer was liable? Lord Chief Justice *Lee* ruled, that though the ship was so long at her moorings, yet she could not be said to be there in *good safety*, which must mean the opportunity of unloading and discharging; whereas here she was arrested within the twenty-four hours, and the hands having deserted, and the regency taken time to consider the petition, there was no default in the master or owners: and it was proved that till the fourteen days were expired, no application could be made to air the goods; whereupon the jury found for the plaintiff.

Waples v.
Eames,
2 Stra. 1243.

In an insurance upon *freight*, if an accident happens to the ship before any goods are put on board, which prevents her from sailing, the insured upon the policy cannot recover the freight which

which he would have earned, if she had sailed. The circumstances of the case were these :

Tonge v.
Watts,
2 Stra. 1251.

The plaintiff insured *on ship and freight*, at and from *Jamaica to Bristol*. A cargo was ready to put on board ; but the ship being careening, in order for the voyage, a sudden tempest arose, and she and many others were lost. The rigging and parts of her were recovered and sold, and the defendant paid into court, as much as, upon an average, he was liable to for the loss of the ship : but the plaintiff insisted to be allowed six hundred pounds for the freight the ship *would have earned* in the voyage, if the accident had not happened. But as the goods were not *actually* on board, so as to make the plaintiff's right to freight commence ; Lord Chief Justice *Lee* held, he could not be allowed it, and he was nonsuited.

Montgomery v. Eg-
ginton,
3 Term
Rep. 362.

But if the policy be a valued policy, and part of the cargo on board when such accident happens, the rest *being ready to be shipped*, the insured may recover to the whole amount. This was so decided in an action brought by the assured on a policy on freight valued at 1500*l.* In fact only 500*l.* worth of freight was on board when the ship was driven from her moorings and lost : but goods to the amount of the rest of the freight *were ready* to be shipped, and were lying on the quay for that purpose at the time. Lord *Kenyon*, before whom the cause was tried, told the jury, that the question for their consideration was, whether this was a mere colourable insurance and a gaming policy, or whether it was a *bonâ fide* transaction ; if the latter, the insured was entitled to recover for the whole value in the policy. The jury found the whole sum. The defendant's counsel obtained a rule for a new trial, which he afterwards abandoned, the court being strongly of opinion against him.

Thompson
v. Taylor,
6 Term Rep.
478.

So also, in an *open* policy on freight, *at and from London and Teneriffe to any of the West India isles*, (*Jamaica* excepted,) the underwriters were held liable to pay the insurance, though the ship sailed from *London* in ballast, and was captured before her arrival at *Teneriffe*, where the cargo was to be put on board. But as the ship was under a charter-party *to depart out of the river Thames, and proceed to Teneriffe, and there to load and receive on board from the freighters 500 pipes of wine, to deliver in the West Indies, for the freight of which 500 pipes, the freighters covenanted to pay 35 s. per pipe* ; the court held, that the instant the ship departed from the *Thames*, the contract for freight had its inception, and the plaintiff was entitled to recover.

Gordon v.
Morley.
Campbell v.
Bordieu.
2 Stra. 1265.

On an insurance from *London to Gibraltar*, warranted to depart with convoy ; it appeared there was a convoy appointed for that trade at *Spithead*, and the ship *Ranger*, having tried for convoy in the *Downs*, proceeded for *Spithead*, and was taken in her way thither. The insurers resisted the demand of indemnity, alleging, that as there was a *French* war, the ship should not have ventured through the *Channel*, but have waited for occasional convoy. Lord Chief Justice *Lee*, however, was of opinion, that the ship was to be considered as under the defendant's insurance to a place of general rendezvous, according to the interpretation of the words,
warranted

warranted to depart with convoy, Salk. 443. 445.; and if the parties meant to vary the insurance from what is commonly understood, they should have stated it. Two special juries of merchants found their verdicts agreeably to that direction.

A bill was filed in the court of Chancery, which stated, that the ship *Eyles*, late in the *East India Company's* service, was, in the year 1732, at *Bengal*, at which time the owner employed *I. H.* to insure the ship in the *London Assurance Office* for five hundred pounds. The adventure thereon was to commence from her arrival at *Fort Saint George*, and thence to continue till the said ship should arrive at *London*, and that it should be lawful for the said ship, in the said voyage, to stay at any ports or places without prejudice, and the ship was, and should be rated at interest or no interest, without farther account; in consideration whereof, *I. H.* paid fifteen pounds premium. The *Eyles* came to *Fort St. George* in *February 1733*, in her way to *England*; but being leaky, and in a very bad condition, upon the unanimous advice of the governor, council, commanders of ships, &c., she sailed to *Bengal* to be refitted, and after being sheathed, in her return upon her homeward-bound voyage, she struck upon the *Engilee* sands and was lost. Evidence was read on the part of the plaintiffs to prove, that *Bengal* was the most proper place to refit, and that she went thither for that reason; that this was a voyage of necessity, and not a trading voyage, for she took nothing on board, but water, provision, and ballast. Lord Chancellour *Hardwicke*.—As to the question, whether there has been a breach, or, in other terms, a loss, within the meaning of this policy, the general principles laid down by the plaintiff's counsel are right, that stresses of weather, and the danger of proceeding on a voyage, when a ship is in a decayed condition, are to be considered. In such a case, if she went to the nearest place, I should consider it equally the same as if she had been repaired at the very place from which the voyage was to commence, according to the terms of the policy, and no deviation. It is a very material circumstance, that the governor ordered the lading to be taken out, to shew the necessity of the ship's being repaired, but there is not a syllable of proof why she might not have been equally well repaired at *Fort Saint George*. There is one part of this case which distinguishes it from all others whatever, and that is, as to the certain time the voyage was to commence. The fact is, the ship was lost in *July 1733*, three weeks before the time of making this policy, so that clearly the ship was not at *Fort Saint George* at the time the agreement was made; and therefore it is a material question, whether it comes within the agreement. His Lordship directed an issue to try, whether the loss in *July 1733* was a loss during the voyage, and according to the adventure agreed upon; which issue was afterwards found for the plaintiffs upon a trial in the Common Pleas.

Motteux and others v. the Gov. and Comp. of Lond. Assur. 1 Atk. 545.

In an action upon a policy of insurance, before Lord Chief Justice *Hardwicke*, it has been held, that the words "at and from *Bengal to England*," meant the first arrival at *Bengal*; and it was agreed,

1 Atk. 548.

agreed, that when such words are used in policies, *first arrival* is always implied and understood.

Chitty v.
Selwin,
2 Atk. 359.

It has likewise been held, that when a ship is insured *at and from a place*, and it arrives at that place, as long as the ship is preparing for the voyage upon which it is insured, the insurer is liable: but if all thoughts of the voyage be laid aside, and the ship lie there five, six, or seven years, with the owner's privity, it shall never be said the insurer is liable; for it would be to subject him to the whim and caprice of the owner.

Camden v.
Cowley.
1 Bl. Rep.
417.

This was an action on a policy of insurance on a ship, at and from *Jamaica to London*. The ship had also been insured from *London to Jamaica* generally, and was lost in coasting the island, after she had touched for some days at one port there, but before she had delivered all her outward-bound cargo at the other ports of the island. This was an action on the homeward policy; and in order to shew when the homeward-bound risk commenced, it was necessary to shew at what time the outward-bound risk determined; and the jury, which was special, after an examination of merchants as to the custom, by their verdict, decided, that the outward risk ended, when the ship had moored in any port of the island, and did not continue till she came to the last port of delivery.

In the *Trinity* term following, a motion was made for a new trial, but it was refused; because it had been thoroughly tried, and no new light could be thrown upon it, although Lord *Mansfield* said, the inclination of his opinion at the trial was the contrary way. Mr. Justice *Wilmot* thought, the construction put upon the policy by the jury was the right one.

Barrafs v.
the London
Assurance,
Sittings
after Hilary
1782, at
Guildhall.

In a similar case, Lord *Mansfield* laid down the same doctrine to the jury, namely, that the outward risk *upon the ship* ended twenty-four hours after its arrival in the first port of the island, to which it was destined: but that the outward policy *upon goods* continued till they were landed.

Leigh v.
Mather,
Sittings at
Guildhall,
after Mich.
1795.

The doctrine stated in the two last cases has been confirmed in a late decision. It was an action on a policy of assurance of *the ship Palliser*, and *on goods* on board thereof, on a voyage at and *from Georgia to Jamaica*. The ship arrived at *Montego Bay*, and moored at anchor, and there also the plaintiff's agent sold and delivered the greatest part of the cargo to Messrs. *Adams and Hatton*, merchants there. The captain then entered into a charter-party with *Adams and Hatton* to proceed from thence to *Saint Anne's*, and there to take in a cargo for *London*. After unloading the greatest part of the cargo at *Montego Bay*, and remaining there a month, it was verbally agreed, that the remainder of the cargo, which was lumber, should be carried as ballast to *Saint Anne's*, and accordingly the vessel, after taking in some fustick, proceeded towards *Saint Anne's*, but was wrecked in her passage. For the plaintiff it was insisted, that in such an insurance, the ship might go from port to port; and that, in all events, the goods were protected by the policy till they were all discharged and safely landed. Lord *Kenyon* was clearly of opinion, and that opinion was confirmed

firmed by a special jury, to whom he particularly referred on this occasion, that the risk on the ship ceased, after she had been moored at anchor twenty-four hours in the first port of the island for the purpose of unloading; and the facts disclosed in this case having manifested that *Montego Bay* was also the original destination of the cargo, and that its not being wholly delivered there, was only prevented by a new agreement, the goods could not be recovered under this policy. A ship insured to *Jamaica* generally cannot be permitted to go round the whole island, from port to port, for the purpose of unloading her cargo, especially where, as in this case, the owner of the ship and goods is the same person. The plaintiff was nonsuited.

In construing policies, the *strictum jus*, or *apex juris* is not to be the rule, but a liberal construction is to be adopted, and the usage of trade called in to explain any doubts.

Thus, in an assurance of goods from *Malaga* to *Gibraltar*, and from thence to *England* or *Holland*, the parties having agreed that the goods might be unloaded at *Gibraltar*, and reshipped in one or more *British* ship or ships, and it appearing in evidence that there was no *British* ship at *Gibraltar*, but the goods had been unloaded and put into a *store ship*, (which was always considered as a warehouse) the insurers were held to be liable for the loss of these goods in the store ship.

A ship was insured from *London* to any place beyond the *Cape of Good Hope*. The ship arrived in the river *Canton* in *China*, where, in order to be heeled and refitted, the sails, &c. were taken out, and lodged in a *bank sail*, on an island in the river, (which was proved to be *usual* and beneficial to all concerned). The underwriter was held liable for the loss of the sails by fire, while in this *bank sail*. For the insurer, at the time of underwriting, has under his consideration the nature of the voyage, and the usual manner of doing it. What is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy. If a ship be driven a mile on shore by a hurricane, or be burnt in a dry dock, while repairing, the insurer is liable.

The goods on board the ships, the *Hope* and the *Anne*, were insured at and from *Dartmouth* to *Waterford*, and from thence to the port or ports of discharge, on the coast of *Labrador*, with leave to touch at *Newfoundland*, till the goods should be safely discharged and landed. From the time of their arrival, the crew were chiefly employed in fishing, and took out their cargo only at leisure times, (which was fully proved to be the usage,) and the ships were taken by a privateer, before they were unloaded. The court held, that the insurers were liable; for that according to the usage there was no delay.

With respect to *East India* voyages, the usage of trade has been more notorious than in any other, the question having more frequently occurred.

The charter-parties of the *India Company* give leave to prolong the ship's stay in *India* for a year, and it is common, by a new agreement,

Tierney v.
Etherington,
before
Lee, C. J.
5th March
1743.
1 Burr. 348.

Pell v. Go-
vernor and
Company of
the Royal
Exchange
Assurance,
1 Burr. 347.
Brough v.
Whitmore,
4 Term
Rep. 206.
S. P.

Noble v.
Kennoway.
Dougl. 510.

agreement, to detain her a year longer. The words of the policy too are very general, without limitation of time or place.

These charter-parties are so notorious, and the course of the trade is so well known, that the underwriter is always liable for any intermediate voyage, upon which the ship may be sent, while in *India*, though not expressly mentioned in the policy.

Salvador v.
Hopkins,
3 Burr. 1707.

Thus, where the insurance was "at and from *Bengal* to any ports or places whatsoever, in the *East Indies, China, Persia*, or "elsewhere beyond the *Cape of Good Hope*, forwards and backwards, and during her stay at each place, until her arrival in "*London, &c.*" and the captain, when in *Bengal*, entered into a new agreement for prolonging the ship's stay, and went several intermediate or country voyages, in the last of which she was lost; the insurers were held liable.

Gregory v.
Christie,
B. R. Tr.
24 Geo. 3.
Park, 49.

In an assurance "from *London* to *Madras* and *China*, with liberty to touch, stay, and trade at any ports or places whatsoever," the facts were; that when the ship arrived at *Madras*, she was too late to go to *China* that year, upon which she was sent by the council to *Bengal* to fetch rice, which voyage she performed once, but in the second attempt she was lost. The insurers are answerable on account of the usage.

Farquhar-
son v. Hun-
ter, B. R.
Hil. 25 G. 3.
Park, 50.

In an insurance on a ship "at and from *London* to *Bengal*, beginning the risk upon the ship at *London*, and so to continue till "the arrival of the said ship at *Madras* and *Bengal*, with liberty to "touch and stay at any port or place in this voyage;" the underwriters were held to be answerable for a loss, which happened in an intermediate voyage from *Madras* to *Visagapatnam* for rice, by order of the council.

However, the parties may, by their own agreement, prevent such latitude of construction.

Nor need this be done by express words of exclusion; but if from the terms used, it can be collected that the parties meant so, that construction shall prevail.

Lavabre v.
Willon,
Doug. 284.

Thus, where the general words were restrained by the expressions, "in the outward, or homeward bound voyage;" and "in this "voyage;" the court held that the policy only meant places in the usual course of the voyage "to and from the places "named."

Fletcher v.
Poole, Sit-
tings after
Easter, 1769,
before Lord
Mansfield at
Guildhall,
Park, 51.

When a man insures one species of property, he cannot recover damage, occasioned by the loss of a species of property different from that named in the policy. Thus, under a policy upon the ship, or upon the goods, the insured cannot recover extraordinary wages paid to the seamen, or provisions expended, during a detention to repair, or a detention by an embargo.

Robertson v. Ewer, 1 Term Rep. 127.

Baillie v.
Mondgi-
liane, B. R.
Hil. 25 G. 3.

Nor is the underwriter on goods liable for the freight paid by the owner of the goods to the proprietors of the ship, where the goods were partially lost.

Eden v.
Poole, Sit-
tings after
Hil.
1785.

Neither is an underwriter upon ship and goods liable for the charge of demurrage.

Nor

Nor in an insurance upon a *Greenland ship*, is the underwriter in a policy on *the ship, tackle, and furniture, &c.* liable for the *lines and tackle* employed in the fishery in those seas.

But provisions sent out in a ship for the use of the crew, are protected by a policy on *the ship and furniture*.

In the construction of policies, the loss must be a *direct and immediate consequence* of the peril insured, and not a remote one, in order to entitle the insured to recover.

Thus, in an action upon a policy to recover the value of some negroes, who perished by *mutiny*, which was one of the risks insured against; it was held, that the underwriters were liable for all those who were killed in the mutiny, or who died of their wounds: that all those who died of the bruises which they received in the mutiny, though accompanied with other causes, were to be paid for by the underwriters. But they were not liable for those who had swallowed salt water, and died in consequence thereof, or who leaped into the sea, and hung upon the sides of the ship, without being otherwise bruised, or who died of chagrin; all these having been lost by too remote a consequence.

In the construction of a policy upon time, the same liberality prevails as in other cases; and an attention to the meaning of the contracting parties has always been paid. Hence, in an insurance at and from *Liverpool to Antigua, with liberty to cruise six weeks*; it was held, that this meant a connected portion of time, and not a desultory cruising for six weeks *at any time*.

With respect to perils of the sea, it is to be observed, that every accident, happening by the violence of wind or waves, by thunder and lightning, by driving against rocks, or by the stranding of the ship, may be considered as a peril of the sea; and for such losses the underwriter is answerable.

But a ship driven on an enemy's coast by the wind, and there captured, shall be said to be lost by capture, and not by perils of the sea.

An action was brought to recover the value of certain slaves insured by the policy. The facts were, that the captain missed the island for which he was bound, and the water running short, some of the slaves were thrown overboard, to preserve the rest; and the declaration stated the loss to have happened by perils of the sea. But it was held, that *the mistake* of the captain could not be called a *peril of the sea*.

A ship, which is never heard of, after her departure, shall be presumed to have perished at sea.

This was held in an action on a policy upon the ship from *North Carolina to London*, and the loss was stated to be by sinking at sea; the evidence to support this averment was, that after sailing from port she had never been heard of.

The same was held in a case, where a ship had been captured and ransomed at sea, but was never afterwards heard of, and never arrived at her port of destination.

Holkins v.
Pickersgill,
B. R. East.
23 Geo. 3.
Brough v.
Whitmore,
4 Term Rep. 206.

Jones v.
Schmull,
Guildhall,
Tr. Vac.
1785.
1 Term Rep.
130. note.
See as to in-
surance upon
negroes, stat.
34 G. 3.
c. 80. § 10.
continued by
35 G. 3.
c. 90.

Syers v.
Bridge,
Doug. 527.

1 Show. 323.
Roccus,
Not.

Greene v.
Elmslie,
Peck. 212.

Gregson v.
Gilbert,
B. R. East.
23 Geo. 3.
Park, 62.

Green v.
Brown,
2 Str. 1199.

Newby v.
Rear, Sitt.
after Mich.
3 Geo. 3. Park, 63.

Park, 64.

In *England* no time is fixed, within which payment of a loss may be demanded from the underwriter, in case the ship is not heard of. A practice, however, prevails among merchants, that a ship shall be deemed lost, if not heard of within six months after her departure for any part of *Europe*, or within twelve, if for a place at a greater distance.

2 Burr. 694.
1st point in
Goss v. Wi-
thers.

As to losses by capture, the rule is, that as between the insurer and the insured, the ship is to be considered as lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy: and the insurer must pay the value. If, after a condemnation, the owner recover or retake her, the insurer can be in no other condition, than if she had been retaken or recovered before condemnation. The insurer runs the risk of the insured, and undertakes to indemnify; he must, therefore, bear the loss actually sustained, and can be liable to no more. So that if, after condemnation, the owner recovers the ship in her complete condition, but has paid salvage, or been at any expence in getting her back, the insurer must pay the loss so actually sustained. No capture by the enemy can be so total a loss, as to leave no possibility of a recovery. If the owner himself should retake at any time, he will be entitled; and by a late act of parliament, if an *English* ship retake the vessel captured, either before or after condemnation, the owner is entitled to restitution upon stated salvage. This chance does not, however, suspend the demand for a total loss upon the insurer: but justice is done, by putting him in the place of the insured, in case of a recapture.

Berens v.
Rucker,
1 Bl. Rep.
313.

It has likewise been held, that where a capture has been made, whether it be legal or not, the insurers are liable for the charges of a compromise made, *bonâ fide*, to prevent the ship from being condemned as prize.

Park, 71.

By the marine law of *England*, as practised in the court of Admiralty, it was formerly held, that the property was not changed so as to bar the original owner in favour of a vendee or recaptor, till there had been a sentence of condemnation.

13 Geo. 2.
c. 4.
29 Geo. 2.
c. 34.

But now by statute this right of the original owner, in case of a recapture, is preserved to him for ever, upon payment of stated salvage to the recaptors.

33 Geo. 3. c. 66.

Before the stat. of 19 G. 2. c. 37. several cases were determined upon the question of recapture in the *English* courts; but the same question can never again arise between an insurer and insured.

Park, 777.

If the ship be recovered, before a demand for indemnity is made, the insurer is only liable for the amount of the loss actually sustained at the time of the demand. Or, if the ship be restored at any time subsequent to the payment by the underwriter he shall then stand in the place of the insured, and receive all the benefits resulting from such restitution.

The underwriter, by the express terms of his contract, is answerable for all loss or damage arising to the insured "by the arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever."

In a late case, the declaration claimed a loss of corn, occasioned by the unlawful arrest, restraint, and detention of people to the plaintiffs unknown. The facts upon this part of the case were, that the ship being forced into *Elly* Harbour in *Ireland*, and a great scarcity of corn prevailing there at that time, the people came on board in a tumultuous manner, took the government of the vessel from the captain and crew, weighed her anchor, by which she drove upon a reef of rocks, and would not leave her till they had compelled the captain to sell all the corn considerably below the invoice price. The word *people*, it was contended, at the bar, meant individuals of a nation as opposed to magistrates or rulers. But the court held, that it meant "*the ruling power of the country.*"

Nesbitt v.
Lushington,
4 Term Rep.
783.

In case of an arrest or embargo by a prince, though not an enemy, the insured is entitled to recover against the insurer.

2 Burr. 696.

If the ship be detained by a foreign power, which, in time of war, may have seized a neutral ship, in order to search her for enemy's property, the charges consequent thereupon must be borne by the underwriter.

Saloucci v.
Johnson,
B. R. Hil.
25 G. 3.
Park, 79.

But though an underwriter is liable for all damage arising to the owner of the ship or goods from the restraint or detention of princes, yet that rule shall not be extended to cases where the insured shall navigate against the laws of those countries, in the ports of which he may chance to be detained, or to cases where there shall be a seizure for nonpayment of customs. This was so ruled by Lord Commissioner *Hutchins* in Chancery, in the year 1690: and the reason of it is obvious, because there is a gross fraud on the part of the owner of the property insured; and no man shall take advantage of his own misconduct. If indeed any of those acts were committed by the master of the ship, without the knowledge of the insured, the underwriter would be liable, if not for losses by detention, at least for a loss by the barratry of the master, to which such conduct would most certainly amount.

2 Vern. 176.

It is now settled, that under a policy on a ship and stores, "at "and from a port," in a foreign country, the insurers are liable for the payment of damage occasioned by the detention or seizure of the ship by the government of the country in the loading port.

Rotch v.
Edie,
6 Term Rep.
413.

Another of the risks insured against is the barratry of the master or mariners.

It appears from the cases upon this subject, that any act of the master, or of the mariners, which is of a criminal nature, or which is grossly negligent, tending to their own benefit, to the prejudice of the owners of the ship, without their consent or privity, is barratry.

1 Stra. 581.
2 Stra. 1173.
Cowp. 143.
1 Term Rep.
323.

It is not necessary, in order to entitle the insured to recover for barratry, that the loss should happen *in the act of barratry*; that is, it is immaterial, whether it take place *during* the fraudulent voyage, or *after* the ship has returned to the regular course; for the moment the ship is carried from its right track with an evil intent, barratry is committed.

Cowp. 155.

But the loss, in consequence of the act of barratry, must happen *during the voyage insured*, and within the time limited by the policy,

Lockyer v.
Offley,
1 Term Rep.
252.

policy, otherwise the underwriters are discharged. Thus, if the captain be guilty of barratry by smuggling, and the ship afterwards arrive at the port of destination, and *be there moored at anchor twenty-four hours in good safety*; the underwriters are not liable, if, after this, she should be seized for that act of smuggling.

From the above descriptions of barratry, it will appear, that if the act of the captain be done with a view to the benefit of his owners, and not to advance his own private interest, no barratry is committed. To constitute barratry, it must be without the knowledge or consent of the owners; because nothing can be so clear as this, that no man can complain of an act done, to which he himself is a party. It is material to consider, in what sense the word owner is to be understood, in this definition. It has been argued, that if *A.* be the owner of a ship, and let it out to *B.* as freighter, who insures it for the voyage; and if the deviation be with the knowledge of *A.*, though unknown to *B.*, the insurer is discharged. But the court over-ruled that argument, and said, that, in order to discharge the insurer from the loss by barratry, it must appear, that the act done was by the consent, or with the privity of the owner, *pro hac vice*, that is, the freighter, the person insured.

Cowper,
134.

Knight v.
Cambridge,
2 Ld. Raym.
1349.
1 Str. 581. S. C.

If a declaration state a ship to have been lost by the *fraud and negligence* of the master, that is a sufficient averment of a loss by *barratry*.

Stamma v.
Brown,
2 Str. 1173.

But where a ship sailed a different course from that first intended, which alteration was publicly notified before the ship sailed, and where the master was to have no benefit by the change, it was held not to be barratry.

Elton v.
Brogden,
2 Str. 1264.

So, if a ship take a prize, and instead of proceeding on her voyage, the captain is forced by the mariners to return to port with the prize, against the orders of his owners, the captain is justified by necessity; and it is not barratry, because not done to defraud the owners.

Valleio v.
Wheeler,
Cowp. 143.

A ship was insured from *London to Seville*; she was let to freight for the voyage; she sailed from *London to the Downs*, from whence she sailed to *Guernsey*, which was out of the course of the voyage. The captain went there to take in brandy on his own account, with the knowledge of the original owner of the ship, but not of the freighter for that voyage. This was held to be barratry.

Roberts v.
Ewer, 1 Term
Rep. 127.

A breach of an embargo is, it seems, an act of barratry in the master.

Ross v.
Hunter,
4 Term Rep.
33.

In an action on a policy on goods on board the *Live Oak*, whereof *Joseph Rati* was master, at and from *Jamaica to New Orleans*, it appeared, that the ship was put up as a general ship in *Jamaica* in 1783; that she sailed on the voyage insured in *May* 1783, and arrived in *June* following at the mouth of the river *Mississippi*, which leads up to *New Orleans in Spanish America*; at the distance of about 35 leagues. When the captain had gotten thus far, he dropped anchor, and on his return, without carrying the ship to her

her port of destination, stood away for the *Havannah*, after which he was never heard of. It appeared, that he had a private adventure of negroes of his own on board, which there was reasonable evidence for supposing he intended to have disposed of at *New Orleans*; but finding it difficult to do so, on account of a prohibition to import them into the *Spanish* government, he went to the *Havannah*. The jury found for the plaintiff on the count in the declaration, charging the barratry of the master; and the whole court of King's Bench, upon a motion for a new trial, were of opinion, that the facts stated amounted clearly to the crime of barratry.

So, it has been holden, that if the captain of a ship, contrary to the instructions of his owner, cruize for, and take a prize, and the vessel be afterwards lost, in consequence of it, he is guilty of barratry, even though he libel his prize in the court of Admiralty in the name of himself and his owner; and though the owner had procured a letter of marque, solely with a view to encourage seamen to enter, and without any intention of using it for the purpose of cruising; for whatever is done by the captain to defeat or delay the performance of the voyage is barratry in him, it being to the prejudice of his owners; and though the captain might conceive that what he did was for the benefit of his owners, yet, if he acted contrary to his duty to them, it is barratry.

An act of the captain, *with the knowledge of the owners of the ship*, though without the privity of the owner of the goods, who happened to be the person insured, is not barratry.

If the master of the ship be also the owner, he cannot be guilty of barratry.

It is clear, that if the owner be also the master of the ship, any act, which in another master would be construed barratry, cannot be so in him; because such doctrine would militate against one of the rules above laid down; namely, that no man shall be allowed to derive a benefit from his own crime, which he would do, were he to recover against the insurers for a loss occasioned by his own act. But where it was proved, that the person who was described in the policy as master, and who was treated with as such, carried the ship out of course for fraudulent purposes, it was holden to be *prima facie* evidence of barratry, and that it lay upon the insurer, in order to discharge himself, to shew that the person so acting as master, was also the owner or freighter of the vessel.

This rule, respecting the same person being both owner and master, has been extended in the court of Chancery to a case, where such an owner and master, after mortgaging his ship, had committed barratry; and when the mortgagee brought an action at law against the insurer to recover damages for the loss which he had sustained by this act of barratry, the court, still considering the mortgagor as the owner, granted an injunction.

Even if the parties insert in the policy, that the insurance shall be upon the ship *in any lawful trade*, if the captain commit barra-

Moss v.
Byrom,
6 Term
Rep. 379.

Nutt v.
Bourdieu,
1 Term Rep.
323.

Ross v.
Hunter,
4 Term Rep.
33.

Lewin v.
Swain, in
Can.
16 Geo. 2.
Postlethw.
Dict. vol. i.
p. 147.

Havelock v.
Hanail,
3 Term Rep.
277.

try by smuggling, the underwriters are answerable. For otherwise the word *barratry* should be struck out of the policy; and most clearly, the stipulation in the policy respecting the employment of the ship in a lawful trade, must mean the *trade* on which she is sent by the owners.

If any captain, or mariner, belonging to any ship shall wilfully burn or destroy her, to the prejudice of any merchant loading goods thereon, *or of any person underwriting any policy thereon*, or to the prejudice of the owner of the ship, he shall suffer death as a felon, without benefit of clergy.

If the offence be committed within the body of a county, the offender shall be tried in a court of common law; if upon the high seas, it shall be tried according to the directions of the 28 H. 8. c. 15.

Partial, or, as it is sometimes called, average loss, *ex vi termini*, implies a damage, which the ship may have sustained in the course of her voyage, from any of the perils mentioned in the policy: when applied to the cargo, it also means the damage which goods may have received, without any fault of the master, by storm, capture, stranding, or shipwreck, although the whole, or the greater part thereof, may arrive in port. These partial losses fall upon the owners of the property so damaged, who must be indemnified by the underwriter. For if the goods arrive, but lessened in value through damage received at sea, the nature of an indemnity speaks demonstrably, that it can only be effected by putting the merchant in the same condition in which he would have been, if the goods had arrived free from damage.

2 Burr.
1172.

2 Burr. 1170.

The proportion of damage the merchant may have suffered is ascertained in this way. Where an entire thing, as one hogthead of sugar, happens to be spoiled, if you can fix, whether it be a third, a fourth, or a fifth worse, then the damage is ascertained to a mathematical certainty. This is found out, not by any price at the port of discharge, but by the price at the port of *delivery*, where the voyage is completed, and the whole damage known. Whether the price at the latter be high or low, it is the same thing; for in either case it equally shews, whether the damaged goods are a third, a fourth, or a fifth worse than if they had come sound: consequently, whether the injury sustained be a third, fourth, or fifth of the value of the thing. And as the insurer pays the whole prime cost, if the thing be wholly lost; so, if it be only a third, fourth, or fifth worse, he pays a third, fourth, or fifth, not of the value for which it sold, but of the value stated in the policy. And when no valuation is stated in the policy, the invoice of the cost, with the addition of all charges, and the premium of insurance, shall be the foundation, upon which the loss shall be computed.

Lewis v.
Rucker,
2 Burr.
1167. Dick
v. Allen, at
Guild. after
Mich. 1785,
coram Bul-
ler, J.

1 Magens,
37.

Le Cras v.
Hughes,
B. R. East.
22 Geo. 3.
Park, 111.

This rule of ascertaining the damage will hold wherever there is a specifick description of casks or goods: but in *Le Cras v. Hughes*, the property, which consisted of various goods taken from an enemy, was valued at the sum insured, and part was lost by perils at sea; consequently, the same rule could not be adopted,

on

on account of the nature of the thing insured. The only mode was to go into an account of the whole value of the goods, and take a proportion of that sum, as the amount of the goods lost.

Since the 19th of G. 2. the constant usage has been to let the valuation fixed in the policy remain, in case of a total loss, unless the defendant can shew that the plaintiff had a colourable interest only, or that he has greatly overvalued the goods: but a partial loss opens the policy. This custom, said Lord Mansfield, was introduced by Lord Chief Justice Lee, in a case of *Erasmus v. Banks*, M. 21 G. 2. and in another case of *Smith v. Flexney*, which happened about the same period, the same rule of decision was adopted.

The underwriters of *London* have, by express words inserted in their policy, declared, that they will not be answerable for any partial loss, happening to corn, fish, salt, fruit, flour, and seed, unless it arise by way of a general average, or in consequence of the ship being stranded. This clause was introduced to prevent the vexation of trifling demands, which must have arisen in every voyage, on account of the very perishable nature of the above commodities. This form was formerly used by the two insurance companies, as well as by the private insurers, till the year 1754, when a ship having been stranded, and got off again, the insured recovered a small partial loss against the *London Assurance Company*, since which period, the companies have left out the words, “*or the ship be stranded;*” and are now only liable in cases of a general average: but the old form is still retained by private insurers.

Cantillon v. the London Assurance Company, cited in 3 Burr. 1555.

Upon this clause there have been several determinations, in all of which it has been uniformly held, that the underwriters can in no case be answerable for a partial loss to such commodities: and that no loss shall be deemed a total one, but the absolute destruction of the thing insured; for that while it specifically remains, though perhaps wholly unfit for use, no loss has happened within the meaning of this memorandum.

Corn is a general term, and includes many particulars; peas and beans have been holden to come within the meaning

of the word. *Mason v. Skurray*, Sittings after Hil. 1780, at Guildhall. But in a late trial at Guildhall, in the court of Common Pleas, Mr. J. Wilson was of opinion, that the term salt used in the memorandum did not include saltpetre. *Jouram v. Bourdieu*, Sittings after Easter Term, 27 Geo. 3.

This was held with respect to a cargo of wheat, which was partially damaged in a storm.

Wilson v. Smith, 3 Burr. 1550. *Cockings v. Frazer*, B.R. Park, 114.

The same with respect to a cargo of fish, which was stinking, and of no value when examined.

E. 25 G. 3.

A cargo of peas was so much damaged, that the produce was three-fourths less than the freight; but as it in fact arrived at the port of destination, the underwriter was holden not to be liable.

Mason v. Skurray, Sitt. after Hil. 1780, at Guildhall.

When the quantity of damage sustained in the course of the voyage is known, and the amount, which each underwriter upon the policy is liable to pay, is settled, it is usual for the underwriter to indorse on the policy, “*adjusted this loss, at so much per*”

Park, 117.

“cent.” or some words to the same effect. This is called an adjustment.

Hog v.
Goulding,
Sitt. after
Tr. 1745,
at Guildh.

cor. Lee, C. J. Beave's Lex Mercat. 310.

It has been determined, that after an adjustment has been signed by the underwriter, if he refuse to pay, the owner has no occasion to go into the proof of his loss, or any of the circumstances respecting it.

Rodgers v.
Maylor,
Sitt. after
Tr. 1790,
Park, 118.

However, this rule has of late been somewhat relaxed. An action was brought on a policy of assurance on ship and goods from *London to Shelburne, in Nova Scotia*. The policy had been adjusted by the defendant at 50 *per cent.*, and it was contended, that he was now bound by that adjustment. On the other hand, it was argued, that the adjustment was not binding; and that if it were, it ought to be declared upon specially. Lord *Kenyon* said, that he did not think it necessary to declare on the adjustment specially, that it was *prima facie* evidence against the defendant; but if there had been any misconception of the law or fact, upon which it had been made, the underwriter was not absolutely concluded by it.—This turned out to be the case, and there was a verdict for the defendant.

De Garron
v. Gal-
braiths,
Sitt. after
Tr. 1795.
Park, 118.

Again, the plaintiff produced no other evidence at the trial but the adjustment; and the witness, who proved it, swore, that doubts, soon after they had signed it, arose in the minds of the underwriters, and they refused to pay; upon which Lord *Kenyon* said, that under those circumstances, the plaintiff must go into other evidence, which not being prepared to do, he was nonsuited. In the following term a motion was made to set aside the nonsuit, upon the ground that an adjustment was *prima facie* evidence of the whole case, and threw the *onus probandi* upon the underwriter; and that it amounted to more than proof of the defendant's subscription to the policy.—Lord *Kenyon*: I admit the adjustment to be evidence in the case to a certain extent; but I thought at the trial, and still think, that when the same witness, who proved the signature of the defendant to the adjustment, said, that doubts, soon after the adjustment took place, arose in the minds of the underwriters, as to the honesty of the transaction, and they called for further proof, the plaintiff should have produced other evidence: and that to shut the door against inquiry after an adjustment, would be to put a stop to candour and fair dealing amongst the underwriters. The rule was refused.

Thellusson
v. Fletcher,
Doug. 301.

An action was brought upon an insurance upon goods on board a *foreign ship*, “the policy to be deemed sufficient proof of interest “in case of loss.” The defendant suffered judgment to go against him by default; and on a motion to set aside the writ of inquiry, the court of King's Bench said, that although such a policy would be void in this country, by virtue of the statute of the 19th G. 2. c. 37., yet the statute did not extend to policies on foreign ships: and in this case the underwriter, having suffered judgment to go by default, has confessed the plaintiff's title to recover; and the amount of that loss was fixed, by his own stipulation in the policy, which he cannot now controvert.

If an insurer pay money for a total loss, and in fact it be so at the time of adjustment; if it afterwards turn out to be only a partial loss, he shall not recover back the money so paid to the insured. But substantial justice is done, by putting him in the place of the insured, and giving him all the advantages that may arise from the salvage.

A box of bullion was wholly lost, the loss adjusted and paid, and an agreement was entered into at the time of adjustment, that the insured would refund to the insurer whatever he should recover in such proportion as the sum insured bore to the whole interest. The bullion was afterwards fished up, and the insured paid into court the insurer's proportion, after deducting salvage. The court held this to be right.

Da Costa v.
Firth,
4 Burr.
1966.

Salvage is an allowance made for saving a ship, or goods, or both, from the dangers of the seas, fire, pirates, or enemies: and it is also sometimes used to signify the thing itself, which is saved; but it is in the former sense only, in which it is here used.

Beawe's Lex
Mer. 146.

Underwriters by their policy, expressly undertake to bear all expences of salvage.

Park, 140.

The valuation of a ship and cargo in order to ascertain the rate of salvage, may be determined by the policies of insurance made on them respectively; if there be no reason to suspect they are undervalued. If there be no policy, the real value must be proved by invoices, &c.

In order to entitle the insured to recover expences of salvage, it is not necessary to state them in the declaration, as a special breach of the policy.

Thus, in a declaration on a policy on goods, it was stated, that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled. Lord *Hardwicke* held, that under this declaration, the plaintiffs might give in evidence the expences of salvage.

Carey v.
King. Ca.
temp.
Hardw. 304.

But if the insurer pay to the insured such expences, and from particular circumstances the loss be repaired by unexpected means, the insurer shall stand in the place of the insured, and receive the sum thus paid to atone for the loss.

Randal v.
Cockran,
1 Vez. 98.

Before a person insured can demand from the underwriter a recompence for a total loss, he must abandon to him whatever claims he may have to the property insured.

Park, 143.

As soon as the insured receive accounts of such a loss as entitles them to abandon, they must, in the first instance, make their election whether they will abandon or not: and if they abandon, they must give the underwriters notice in a reasonable time, otherwise they waive their right to abandon, and can never afterwards recover for a total loss.

Mitchell v.
Edie,
1 Term Rep.
608.

But if the insured, hearing that his ship is much disabled, and has put into port to repair, express his desire to the underwriters to abandon, and be dissuaded from it by them, and they order the repairs to be made; they are liable to the owner for all the subsequent damage occasioned by that refusal, though it should amount to the whole sum insured. For the reason why the notice

Da Costa v.
Newnham,
2 Term
Rep. 407.

notice of abandonment is deemed necessary, is to prevent surprise or fraud upon the underwriter : but, in the case put, they have by their own act superseded the necessity of notice.

Park, 144. When an abandonment is made, it must be total, and not partial.

2 Burr. 697. The insured may in all cases choose not to abandon : but he cannot at his pleasure abandon, and thereby turn a partial into a total loss.

Park, 146. The insured may abandon to the underwriter, and call upon him for a total loss, if the damage exceed half the value ; if the voyage be absolutely lost or not worth pursuing ; if further expence be necessary ; or if the insurer will not engage at all events to bear that expence, though it should exceed the value, or fail of success.

1 Term Rep. 191. But he cannot abandon, unless at some period or other of the voyage there has been a total loss : and if neither the thing insured, nor the voyage is lost, and the damage does not amount to a moiety of the value, he shall not be allowed to abandon.

Pringle v. Hartley, 3 Atk. 195. A ship was taken by a *Spanish* privateer, retaken by an *English* privateer and carried into *Boston* in *New England*, where, as no person appeared to give security for the salvage, she was sold ; the recaptors had their moiety, and the overplus remaining in the hands of the officers of the court of Admiralty, the owners were entitled to abandon and to recover for a total loss.

Goss v. Withers, 7 Burr. 683. A ship was taken by the *French*, remained with them eight days, and was then retaken : the master, mates, and sailors, except a landman and an apprentice, had been taken out and carried to *France*. Before the capture, the ship had been separated from her convoy, and was so far disabled by storm, as to be incapable of proceeding in her voyage without going into port to refit. Part of the cargo was thrown overboard in the storm, and the rest spoiled while the ship lay at *Milford Haven*. In actions upon two policies, one on the ship, and the other on the cargo, it was held, that this was a total loss, so as to entitle the owner to abandon.

Milles v. Fletcher, Dougl. 219. A ship, bound from *Mountferrat* to *London*, was captured, and the captain, crew, rigging, and part of the cargo, which was sugar, were taken away. She was retaken and carried into *New York*, where the captain also arrived. Upon taking possession he found, that part of the cargo that was left had been washed overboard ; that 57 hogsheads of what remained were damaged, and that the ship was in such a state that she could not be repaired, without unloading her entirely. The owners had no storehouses at *New York* ; nor were any sailors to be had. The salvage came to forty hogsheads of sugar ; and if the ship had been repaired, it would have exceeded the freight by 100*l*. There was an embargo laid on all ships till *December*, and this ship was to have arrived in *London* in *July* preceding. The captain, upon the advice of his friends, sold the cargo, and was paid for it : he agreed also to sell the ship ; but the person who contracted for her ran away, upon which the captain left her in a creek, and came to *England*. The owners

owners of the ship had a right to abandon to the insurers on the ship and freight.

The right to abandon must depend upon the nature of the case at the time of the action brought, or at the time of the offer to abandon: and therefore if at the time advice is received of the loss, it appears that the peril is over and the thing in safety, the insured has no right to abandon. Thus, in a case where there was a capture and recapture, and it was stated that at the time of the offer to abandon, the ship was safe in port, and had sustained no damage, the court held, that the insured had no right to abandon.

Hamilton v.
Mendes,
2 Burr.
1198. 1 Bl.
Rep. 276.
S. C.

But if the underwriter pay for a total loss, and it afterwards turn out to be but partial, the insured shall not be obliged to re-fund: but the insurer shall stand in his place for the benefit of salvage.

Da Costa v.
Firth,
4 Burr.
1966.

A ship was insured from *Wyburg* to *Lynn*, at which place she arrived: the jury found that the ship was not worth repairing; but the damage sustained in the voyage insured did not exceed 48 l. *per cent.* By the court—The jury have precluded us from saying this is a total loss; and where neither the thing insured nor the voyage is lost, the insured cannot abandon.

Cazalet v.
Barbe,
1 Term Rep.
187.

An insurance was made on ship, cargo, and freight, at and from *Tortola* to *London*, warranted free of particular average. On the first of *August* the whole fleet got under way, but not being able to get clear of the islands, they anchored that night, and the next day got clear of them. About ten o'clock of the 2d of *August*, several squalls of wind arose, which occasioned the ship to strain, and make water so fast, that the crew were obliged to work both pumps: on the 3d, the captain made a signal of distress, and returned to *Tortola*. A survey was held, by which the ship was declared unable to proceed to sea with her cargo; and that she could not be repaired in any of the *English West India* islands. Many of the sugars in the bilge and lower tier were washed out, and several of the casks broke and in bad order. This was holden to be a total loss, the voyage being entirely defeated.

Manning v.
Newnham,
Tr. 22 G. 3.
Park, 168.

Policies are annulled by the least shadow of fraud or undue concealment of facts; and both parties are equally bound to disclose circumstances, within their knowledge: for if the insurer, at the time he underwrote, knew that the ship was safe arrived, the contract will be void.

A policy was held to be void, where goods were insured as the property of an ally, when in fact they were the goods of an enemy.

Skin. 327.

A ship was known to have sailed from *Jamaica* on the 24th of *November*; and the agent told the insurer she sailed the latter end of *December*; the policy was declared void.

Guildhall, after Tr. 1742.

In an insurance upon goods, the insured warranted the ship and goods to be neutral; it was expressly found by the jury, that they were not neutral. The court, therefore, though the loss happened by storms, and not by capture, declared that the insured could not recover.

Roberts v.
Founeureau,
Sittings at
Tr. 1742.
Woolmer v.
Mullman,
3 Burr.
1419. 1 Bl.
Rep. 427.
S. C.

Goods

Fernandes v. Da Costa, Sittings after Hil. 4 G. 3. Da Costa v. Seandret, 2 P. Wms. 170. Goods were insured on board a ship, warranted *Portuguese*. The goods were lost by a different peril, but in fact the ship was not *Portuguese*. The policy was adjudged void *ab initio*.

One having an account that a ship, described like his, was taken, insured her, without giving any notice to the insurers of what he had heard. The policy was decreed in equity to be delivered up.

Seaman v. Founereau, 2 Str. 1183. The agent for the plaintiff, two days before he effected the policy, received a letter from *Corves*, in which were these words: "On the 12th of this month I was in company with the *Davy* (the ship in question), at twelve at night lost sight of her all at once; the captain spoke to me the day before that she was "leaky, and the next day we had a hard gale." The ship, however, rode out the gale, and was captured by the *Spaniards*. The policy was held to be void, because the letter was not communicated to the insurer.

Hodgson v. Richardson, 1 Bl. Rep. 463. A ship was insured, "at and from Genoa." The ship loaded at *Leghorn*, and was originally bound for *Dublin*; but losing her convoy, she put into *Genoa* in *August*, and lay there till the *January* following. All these facts were known to the insured, but not communicated to the insurer. The policy was held to be void.

Ratcliffe v. Shoolbred, Sittings at Guildhall, after Tr. 1780, Park, 181. A ship being bound from the coast of *Africa* to the *British West Indies*, sailed from *St. Thomas's* on the coast of *Africa* on the 2d of *October*, a circumstance with which the plaintiff was acquainted by a letter received in *February*. The policy was not made till the 21st of *March*. The letter was not shewn, nor was any thing said of her sailing from *St. Thomas's*, but in the instructions "the ship "was said to have been on the coast the 2d of *October*." The policy was held to be void.

Fillis v. Bruton, Sittings at Guildhall, after Hil. 1782, Park, 182. The broker's instructions stated *the ship ready to sail on the 24th of December*; the broker represented to the underwriter that the ship was in port, when in fact she had sailed the 23d of *December*. The policy was void.

Carter v. Boehm, 3 Burr. 1905. 1 Bl. Rep. 593. S. C. But there are many matters as to which the insured may be innocently silent; 1st, As to what the insurer knows, however he came by that knowledge; 2d, As to what he ought to know; 3d, As to what lessens the risk. An underwriter is bound to know particular perils, as to the state of war or peace. If a privateer is insured, the underwriter needs not be told her destination.—An insurance was made on *Fort Marlborough* in the *East Indies* for twelve months against the attacks of an *European* enemy, for the benefit of the governor. The defence set up was an undue concealment of circumstances, particularly the weakness of the fort, and the probability of its being attacked by the *French*. The court held that the policy was good.

Planché v. Fletcher, Dougl. 238. A ship was insured "from *London* to *Nantz*, with liberty to call "at *Ostend*." The ship's clearances and papers were all made out for *Ostend*; but she was never intended to go thither. After the policy was made, war was declared against *France*. Two defences were set up; 1st, That there was a fraud in clearing out the

the ship for *Ossend*, when she never was designed for place. 2d, That as hostilities were declared after the policy was signed, and before the ship sailed, the defendant ought to have had notice. The court held that neither of the objections was valid; for as to the first it was the common usage; and of the second the insurer was bound to take notice.

An underwriter refused to pay a loss by capture, the ship being *Portuguese* and condemned for having an *English* supercargo on board, because the insured had not disclosed that circumstance. The court held, that the condemnation was unjust, and was not such a circumstance as the insured was bound to disclose.

A representation is a state of the case, not forming a part of the written instrument or policy; and it is sufficient if it be substantially performed. If there be a misrepresentation, it will avoid the policy, as a fraud, but not as a part of the agreement. Even written instructions, if they are not inserted in the policy, are only to be considered as representations; and in order to make them valid and binding as a warranty, it is necessary that they make a part of the written instrument. But if a representation be false in any material point, it will avoid the policy; because the underwriter has computed the risk upon circumstances which did not exist.

The following instructions were shewn to the first underwriter, but not inserted in the policy, "Three thousand five hundred pounds upon the ship *Julius Caesar*, for *Halifax*, to touch at *Plymouth*, and any port in *America*: she mounts twelve guns, and twenty men." These instructions were not shewn to the present defendant, but she was represented generally as a ship of force. At the time of her capture, she had on board 6 four-pounders, 4 three-pounders, 3 one-pounders, 6 swivels, and 27 men and boys in all, of which 16 only were men. The witness said, he considered her as being stronger with this force, than if she had 12 carriage guns, and 20 men; and that there were neither men nor guns on board at the time of the insurance. The court held, that these instructions were only a representation; and that they had been substantially performed.

A ship was insured at and from *Port l'Orient* to the *Isles of France* and *Bourbon*, and to all or any ports or places where, and whatsoever, in the *East Indies*, *China*, *Persia*, or elsewhere, beyond the *Cape of Good Hope*, from place to place, and during the ship's stay and trade, backwards and forwards, at all ports and places, and until her safe arrival back at her last port of discharge in *France*. A slip of paper, at the time the policy was underwritten, was waivered to it, and shewn to the underwriters, on which was written the following representation: "The ship has had a complete repair, and is now a fine and good vessel, three decks. Intends to sail in *September* or *October* next. Is to go to *Madaira*, the *Isles of France*, *Pondicherry*, *China*, the *Isles of France*, and *l'Orient*." The ship, in fact, did not sail till the 6th of *December*, and did not reach *Pondicherry* till the month of *July* following.

Mayne v.
Walter,
B. R. East.
22 Geo. 3.
Palk, 125.

Park, 196.

Pawson v.
Watson,
Cowp. 785.

Bize v.
Fletcher,
Douglt. 271.

following. She continued there till *August*, when instead of proceeding to *China*, she sailed for *Bengal*, where having passed the winter and undergone considerable repairs, she returned to *Pondicherry*, and after taking in a homeward-bound cargo at that place, proceeded in her voyage back to *l'Orient*, but was taken by the *Mentor* privateer. The usual time, in which the direct voyage is performed between *Pondicherry* and *Bengal* is six or seven days; but this ship was six weeks in going to, and two months in returning from *Bengal*, and lay off *Madras*, *Masulipatam*, *Visigapatam*, and *Yanon*, and took in goods at all those places. Lord *Mansfield* told the jury, that if no fraud was intended, and that the variance between the intended voyage, as described in the slip of paper, and the actual voyage as performed did not tend to increase the risk, *this slip of paper being only a representation*, the plaintiff was entitled to their verdict.

If the misrepresentation be in a *material* point, it will avoid the policy, even though it happen by mistake.

Macdowell
v. Fraser,
Doug. 247.

Thus, in a policy on a ship from *New York* to *Philadelphia*, the broker represented to the insurer that the ship was seen safe in the Delaware on the 11th of December by a ship which arrived at *New York*; whereas in fact the ship was lost on the 9th of December. The policy was held to be void, although there was no suspicion of fraud.

Shirley v.
Wilkinson,
Doug. 293.

The same rule holds if the broker conceal any thing *material*, though the only ground for not mentioning it should be that the fact concealed appeared immaterial to him.

Barber v.
Fletcher,
Doug. 292.

But the thing concealed must be some fact, not a mere speculation or expectation of the insured. Thus, where a broker insuring several vessels, speaking of them all, said, "which vessels are expected to leave the coast of *Africa* in *November* or *December*;" the policy was held good, although in fact the ship in question had sailed in the month of *May* preceding.

Park, 208.

Wherever there has been an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself who is interested, or of his agent; for in either case the contract is founded in deception, and the policy is consequently void.

This rule prevails, even though the act cannot be at all traced to the owner of the property insured.

Stewart v.
Dunlop,
Cas. of
House of
Lords, Apr.
8, 1785.

A man having arrived at *Greenock*, knowing of the loss of the ship insured, and meeting an intimate friend and acquaintance of the insured, and a partner with him in some other transactions, communicated the intelligence of the loss of the ship to him, who desired it might be concealed. The same day the person receiving the account held a conversation with the plaintiff's clerk, who, notwithstanding that, swore, that he had no information from him respecting the ship, nor did he get any hint from him, further than the said person asking the deponent, if he knew whether there was any insurance made upon her, and if there was any account of her. The same day the plaintiff desired this clerk to write to get an insurance

insurance effected, which he did, without telling his master of this conversation. The Court of Session in *Scotland* held the policy to be void; and the House of Lords confirmed the decree.

The plaintiff's agent shipped goods for the plaintiff, and wrote to the plaintiff's agent in town to get an insurance done. The letter was dated the 16th of *September*, and it contained this sentence, "I this day shipped on board the *Joseph*, which sailed immediately, a cargo of oats, &c." This letter was not however sent till one o'clock on the 17th. The case states, that about six o'clock in the evening of the 16th, *Thomas* (the agent) heard a report that the ship was on shore; and at six o'clock in the morning of the 17th he knew the ship was lost. The policy was held void on account of the fraud in *Thomas*.

Fitzherbert
v. Mather,
1 Term
Rep. 12.

The courts of justice in this country have not yet adopted any general rule with respect to the return of premium in cases of fraud. In two or three instances in the court of Chancery, where the underwriters have been relieved from the payment of the sums insured, on account of fraud, the decree has directed the premium to be returned.

Thus, in a case in the year 1690, the defendant and others had come to the insurance office, and bought a policy for insuring the life of one *Horwell* (upon whose life they had no concern or interest depending) for a year; and the policy ran whether interested or not interested, at a premium of 5 *l. per cent.* They took this way of drawing in subscribers: they agreed with one *Marwood* a known merchant upon the Exchange, and a leading man in such cases, to subscribe first; but in case *Horwell* died within the year, *Marwood* was to lose nothing, but on the contrary was to share what should be gained from the other subscribers. Upon the credit of *Marwood*'s subscribing, several others (who had inquired of *Marwood* about *Horwell*, who was his neighbour) subscribed likewise. *Horwell* lived about four months, and then died; and this bill was brought to be relieved against the policy; and this matter being all confessed by the answer, the court decreed the policy to be delivered up, and the premium to be repaid.

Wittingham
v. Thornborough. Pr.
Ch. 20.
2 Vern. 206.
S. C.

So also, in the case of *Da Costa v. Scandrett*, Lord *Macclesfield*, although he held the policy to be void, on the ground of fraud, decreed the premium to be returned to the insured.

Da Costa v.
Scandrett,
2 P. Wms.
170.

It is true, that during the argument in the case next to be quoted, the counsel cited a case of *Rucker v. Hollingbury*, in which the Master of the Rolls had been of a different opinion from that delivered in the two preceding cases. But Lord *Mansfield* said, that there must be some mistake in reciting the case before the Master of the Rolls; for the practice of the court of Chancery was certainly agreeable to the two former cases.

The case, in which this observation was made, was an action on a policy of insurance on a ship, with a count of a general *indebitatus assumpsit* for money had and received to the plaintiff's use; and damages were laid at 98 *l.* The trial was had, under a decree of the court of Chancery, where the now defendant, the insurer, being

Wilson v.
Duckett,
3 Burr.
1361.

being there complainant, *had offered to pay back the premium, which was 10 l.* No money was, in the present case, paid into court; though the usual course in these cases is for the defendant, the insurer, to bring the premium into court. The jury found a verdict for the plaintiff, for the ten pounds premium, on the count for money had and received to his use; although they were of opinion against the policy, upon the foot of fraud; and found against it, as being fraudulent. In fact, the first underwriter was only a decoy-duck, to induce other persons to underwrite the policy: and it had been previously agreed between the insured and him, that he should not be bound by signing the policy; which this court considered as a fraud, and therefore that the jury had given a right verdict in finding the policy fraudulent. With the concurrence of Lord *Mansfield*, (before whom this cause was tried,) and of the counsel on both sides, it was agreed to bring this question before the court, whether, upon a policy of insurance being found fraudulent, the premium should be returned to the plaintiff (the insured), or retained by the defendant (the insurer)? The cases above mentioned were quoted by the counsel for the plaintiff; but they being all in Chancery, Lord *Mansfield* said, he wanted to know whether there was any common law determination to the same effect. As it did not appear that there was, his Lordship said, It was plain what must be done in this case; for he looked upon *the offer made* by the complainant's bill in equity, to be the same thing as if the money had *actually been brought into court* in the present case.

But although the common law has been so silent upon the subject, as not to lay down any general rule; and although, in all the cases stated, the premium was restored; yet, if the fraud is notorious, palpable, and gross in its nature, the court may order, and has ordered, the underwriter to retain the premium.

Tyler v.
Horne,
Sittings at
Guildhall,
after Hil.
T. 1785.

Thus, where an action was brought by the insured to recover 150 l., being the amount of the defendant's subscription; the ground of refusal was, that the insurance was fraudulent; and that the plaintiff knew of the loss of the ship, at the time of effecting the policy. The counsel for the plaintiff were under the necessity of admitting that their client had made some fraudulent insurances upon this very ship, subsequent to the one now in dispute; but contended, that news of the loss of the ship had not arrived, till after this particular one was effected. The evidence, however, was so strong as easily to convince the jury, that the plaintiff had received information of the loss before the order for making the insurance was given to the broker; and they found a verdict for the defendant.

Lord *Mansfield* said, The fraud was so gross, that the premium should not be recovered from the underwriter.

It is proper, however, to observe, that it has been laid down as clear law, that if the underwriter has been guilty of fraud, an action lies against him, at the suit of the insured, to recover the premium. Thus it was said by Lord *Mansfield*, in the case of *Carter v. Boehm*:
“The policy would be void against the underwriter, if he concealed

“any

“ any thing ; as, if he insured a ship on her voyage, which he privately knew to be arrived ; and an action would lie to recover the premium.”

By statute 1 Ann. st. 2. c. 3. § 4. it is enacted, That if any captain, master, mariner, or other officer, belonging to any ship, shall willingly cast away, burn, or otherwise destroy the ship unto which he belongeth, or procure the same to be done, to the prejudice of the owner or owners thereof, or of any merchant or merchants that shall load goods thereon, (or, by a subsequent statute, to the prejudice of any person or persons that shall underwrite any policy or policies of insurance thereon,) shall suffer death as a felon. 4 Geo. 1. c. 12. § 3.

Every ship insured must, at the time of the insurance, be able to perform the voyage, unless some external accident should happen ; and if she have a latent defect wholly unknown to the parties, that will vacate the contract, and the insurers are discharged. This arises from a tacit and implied warranty, that the ship shall be in a condition to perform the voyage. Mills v. Roebuck, in the Exch. Park, 221.

But, though the insured ought to know whether she was seaworthy or not at the time she set out upon her voyage ; yet, if it can be shewn that the decay to which the loss is attributable did not commence till a period subsequent to the insurance, the underwriter will be liable, if she should be lost a few days after her departure.

It was said by Lord Mansfield, that “ by an implied warranty every ship insured must be tight, staunch, and strong ; but it is sufficient if she be so at the time of her sailing. She may cease to be so in twenty-four hours after her departure, and yet the underwriter will continue liable.” Eden v. Parkinson, Dougl. 708.

However, if a ship sail upon a voyage, and in a day or two become leaky, and founder, or be obliged to return to port, without any storm, or visible or adequate cause to produce such an effect, the presumption is, that she was not seaworthy when she sailed ; and the jury, upon the plaintiff’s own case, may draw such a conclusion. Murray v. Vandam, Sittings at Guildhall, after Mich. 1794, coram Kenyon, C. J.

As it is a condition or implied warranty in every policy of insurance, that the ship is seaworthy, there need be no representation of that ; for if she sail without being so, the policy is void. And any insufficiency in her former voyage, will not vacate the policy. Shoobred v. Nutt, Sittings at Guildhall, after Hil. 1782.

Whenever an insurance is made on a voyage expressly prohibited by the common law, statute, or maritime law of this country, the policy is void. Park, 232.

The goods on board a ship were insured “ at and from London to New York, warranted to depart with convoy from the channel for the voyage.” She had provisions on board, which she had a licence to carry to New York under a proviso in the prohibitory act of 16 G. 3. c. 5. But one-half of the cargo, including the goods, which were the subject of this insurance, was not licensed. The commander in chief had issued a proclamation to allow the entry of unlicensed goods ; but he had no authority under the act of Johnson v. Sutton, Dougl. 241.

parliament to issue such proclamation, or to permit the exportation of unlicensed goods. The statute prohibits all intercourse with *New York*, and confiscates all ships trading to that place, unless they have a licence. The court held the policy was void: it is immaterial whether the underwriter did or did not know that the voyage was illegal; for the court cannot substantiate a contract in direct contradiction to law.

Delmada v. Motteux, B.R. Mich. 25 Geo. 3. Park, 234. If a ship, though neutral, be insured on a voyage prohibited by an embargo, such an insurance is void.

Planché v. Fletcher, Dougl. 238. An insurance upon a smuggling-voyage prohibited by the revenue laws of this country would be void. *Aliter*, if merely against the revenue laws of a foreign state; for no country pays attention to the revenue laws of another.

Bond. Sitings, Hil Vac. 1780. Park, 237.

Brandon v. Nesbitt, 6 Term Rep. 23. Bristow v. Towers, *Id.* 35. No insurance can be legally made on an enemy's property.

Park, 244. All insurances upon commodities, the importation or exportation of which is prohibited by law, are void. And this rule prevails, whether the insurer did or did not know, that the subject of the insurance was a prohibited commodity.

By statute 4 & 5 W. & M. c. 15. § 14, 15, 16. a penalty of 500*l.* is inflicted on the insurer, who shall by way of insurance procure the importation of prohibited goods; and a like penalty on the insured.

By 8 & 9 W. 3. c. 36. § 1. the importation of any foreign alammodes or lustrings, by way of insurance or otherwise, without paying the duties, is expressly prohibited.

By 28 G. 3. c. 38. § 45. persons making insurances on wool, &c. are liable for the first offence to a fine of 50*l.* and six months solitary imprisonment. The same penalty is imposed on the insured, and the insurance is void.

In a policy, "valued free from average," and "interest or no interest," it is manifest, that the performance of the voyage or adventure, in a reasonable time and manner, and not the bare existence of the ship or cargo, is the object of the insurance.

A. Mevedo v. Cambridge, 2 Mod. 77. It was declared from the Bench, in the reign of Queen Anne, that such insurances were formerly bad; for it is said in that case, that in former times, if one had no interest, though the policy ran, *interest or no interest*, the insurance was void; because insurances were made for the benefit of trade, and not that persons unconcerned therein, or uninterested in the subject-matter, should profit by them.

Depaiba v. Ludlow, Comyns's Rep. 360. The idea thus started is very much confirmed by what fell from the court in the case of *Depaiba v. Ludlow*: for the court there observed, that insurances upon interest or no interest were introduced *since* the revolution.

But though this mode of insuring thus gained a footing in *England*, yet when introduced, the courts of justice looked upon these contracts

contracts with a jealous eye; and by their determinations shewed the strong prejudices which they entertained against them. The courts of equity in particular manifested that their inclination would lead them as much as possible to suppress such a species of contract: nay, that they still considered them as void.

The defendant had lent money on a bottomry bond, but had no interest in the ship or cargo; the money lent was 300*l.*, and he insured 450*l.* on the ship: the plaintiff's bill was to have the policy delivered up; because the defendant was not concerned in point of interest, as to the ship or cargo. *Per curiam*.—Take it that the law is settled, that if a man has no interest, and insures, the insurance is void, though it be expressed in the policy, *interested or not interested*. The reason the law goes upon is, that insurances were made for the benefit of trade, and not that persons unconcerned therein, and who were not interested in the ship, should profit thereby; and *where one would have the benefit of the insurance, he must renounce all interest in the ship*. And the reason why the law allows that a man, having some interest in the ship or cargo, may insure more, or five times as much, is, that a merchant cannot tell how much or how little his factor may have in readiness to lade on board his ship. *Per cur.*—Decree the policy to be delivered up to be cancelled.

Goddard v. Garrett,
2 Vern. 269.

So, on a policy of insurance on goods, by agreement valued at 600*l.*, the insured not to be obliged to prove any interest; the Lord Chancellour ordered the defendant to discover what goods he put on board; for although the defendant offered to renounce all interest to the insurers, yet it must be referred to the Master to examine the value of the goods saved, and to deduct it out of the value or sum of 600*l.*, at which the goods were valued by the agreement.

Le Pypre v. Farr,
2 Vern. 716.

The difference between policies upon interest, and such as are not, was, that in policies upon interest, the insured recovered for the loss actually sustained, whether it were total or partial: but upon a wager policy, he could never recover but for a total loss.

Goss v. Withers,
2 Burr. 683.

It is enacted by stat. 19 Geo. 2. c. 37. that insurances made on ships or goods, *interest or no interest*, or, *without further proof of interest than the policy*, or by way of gaming or wagering, or *without benefit of salvage to the insurer*, shall be void. By § 2. there is an exception for insurances on private ships of war, fitted out solely to cruise against his Majesty's enemies; and also by § 3. on any merchandizes or effects, from any ports or places in *Europe or America*, belonging to the crowns of *Spain or Portugal*.

This statute hath been frequently holden not to extend to insurances of foreign property, and on foreign ships.

Thellusson v. Fletcher,
Douglt. 301.

It hath been also frequently holden upon this act, that a valued policy is not a wager policy, for the insured must prove some interest, although he need not prove the value of this interest. If indeed it could be made appear, that a valued policy were used merely as a cover to a wager, in order to evade the statute, it would be void.

Lewis v. Rucker,
2 Burr. 1167.
Grant v. Parkinson,
Mich.

22 Geo. 3. B. R. Park, 267. Da Costa v. Firth, 4 Burr. 1963.

Le Cras
v. Hughes,
B. R. East.
22 Geo. 3.
Palk, 269.

Kent v.
Bird,
Cowp. 583.

Upon a joint capture by the army and navy, the officers and crew of the ships have, before condemnation, an insurable interest by virtue of the prize act, which usually passes at the commencement of a war.

All insurances, made by persons having no interest in the event about which they insure, or without reference to any property on board, are merely wagers, and are void. Thus, where the defendant, in consideration of 20*l.* paid by the plaintiff, undertook that the ship should save her passage to *China* that season, or that he would pay 1000*l.* within one month after her arrival in the river *Thames*; the contract was holden to be void, although the plaintiff had some goods on board.

Lowrey v.
Bourdieu,
Doug. 451.

Wherever the court can see upon the face of the policy, that it is merely a contract for gaming, where indemnity is not the object in view, they are bound to declare such policy void. As, where by the policy it appeared, that the plaintiffs had lent 26,000*l.* on bond to a captain of an *East Indian*, to which amount the ship and cargo were insured, and that in case of loss no other proof of interest was to be required than the exhibition of the bond; the court held, that the contract was void.

As to re-assurances, it is declared by stat. 19 G. 2. c. 37. § 4. that it shall not be lawful to make re-assurance, unless the insurer be insolvent, become a bankrupt, or die; in any of which cases, such insurer, his executors, administrators, or assigns, may make re-assurance to the amount before by him insured, expressing in the policy, that it is a re-assurance.

And eè v.
Fletcher,
2 Term
Rep. 161.

A re-assurance was made by the defendant on a *French* vessel, first insured by a *French* underwriter at *Marseilles*, who was living, and, at the time of subscribing the second policy, was solvent. The court were unanimously of opinion, that this re-assurance was void; and that every re-assurance in this country, either by *British* subjects or foreigners, on *British* or foreign ships, is void by the statute, unless *the first assurer be insolvent, become a bankrupt, or die.*

Newby v.
Reed, Sit-
tings in
London,
East. Vacat.
1763,
1 Blackst.
Rep. 416.
Rogers v.
Davis,
Sittings in
Mic. Vac.
17 Geo. 3.
by ore Lord
Mansfield.

In the year 1763, it was ruled by Lord *Mansfield*, Chief Justice, and agreed to be the course of practice, that upon a double insurance, though the insured is not entitled to two satisfactions; yet, upon the first action he may recover the whole sum insured, and may leave the defendant therein, to recover a rateable satisfaction from the other insurers.

Thus also, it was determined in a subsequent case at *Guildhall*. It was an action on a policy of insurance on a ship from *Newfoundland* to *Dominica*, and from thence to the port of discharge to the *West Indies*. It was a valued policy on the ship and freight; and on the goods as interest should appear. The ship sailed from *Saint John's* the 17th of *December* 1775, and the plaintiff declared as for a total loss. The defendant underwrote for 200*l.*, and paid into court 124*l.* This sum was paid on a supposition, that the underwriters on a former policy should bear a share of the loss. The plaintiff had originally insured at *Liverpool* on a voyage from *Newfoundland* to *Barbadoes* and the *Leeward Islands*, with an exception of *American* captures: but the plaintiff afterwards, for

the purpose of securing himself against captures, and having altered the course of his voyage, made the present insurance. The plaintiff now insisted he was entitled to receive the full amount of his insurance against the defendant, and not to any part from the *Liverpool* underwriters, because the voyage now insured was different from that insured at *Liverpool*. There was, however, a verdict for the plaintiff for his full demand, *with liberty for the defendant to bring an action against the Liverpool underwriters, if he thought fit.*

Accordingly in the *Easter* term following, an action was brought for money had and received to the use of the plaintiff, who was the defendant in the last cause, in order to recover a contribution for the loss which the plaintiff had been obliged to pay. It was agreed by both parties to admit, that on the *London* policy (which was the subject of the former action) 2200 *l.* were insured; that on the two *Liverpool* policies 1700 *l.* were insured: that the merchant was interested to the amount of 500 *l.* on the ship; 300 *l.* on the freight; and 1400 *l.* on the cargo. That the plaintiff had paid 200 *l.* loss, and 47 *l.* for the costs. The question was, Whether the defendant was liable to contribute any thing, and what? The whole interest was 2200 *l.* and the whole insurance was 3900 *l.* It was insisted by the counsel for the defendant, that the insurance in *London* was an illegal re-assurance; and therefore the plaintiff might have made a good defence in an action brought against him: and if so, he could not now recover over against the defendant.

Lord *Mansfield*.—The question seems to be, whether the insured has not two securities for the loss that has happened? If so, can there be a doubt that he may bring his action against either? It is like the case of two securities; where, if all the money be recovered against one of them, he may recover a proportion from the other. Then this would bring it to the question, whether the second insurance is void as a *re-assurance*? But a re-assurance is a contract made by the insurer to secure himself; and this is only a double insurance.—There was another ground taken in the cause, which is not material to be mentioned here: but upon this direction, the plaintiff had a verdict.

Although a man, by making a double insurance, shall not be allowed to recover a double satisfaction for the same loss; yet various persons may insure various interests on the same thing, and each to the whole value (as the master for wages, the owner for freight, one person for goods, another for bottomry); and such a contract does not fall within the idea of a double insurance.

A deviation is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular or usual course of the specifick voyage insured. Whenever this happens, the voyage is determined; and the insurers are discharged from any responsibility.

The reason of this is, because the ship goes upon a different voyage from that against which the insurer undertook to indemnify.

Davis v.
Gildart,
Sittings in
East. Vac.
17 Geo. 3.
at Guildhall.

Godin v.
Lond. Assur.
Company,
1 Burr. 489.
1 Bl. Rep.
103. S. C.

Park, 294.

Nor is it material whether the loss be or be not an actual consequence of the deviation; for the insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. Neither does it make any difference whether the insured was or was not consenting to the deviation.

Fox v. Black,
Exeter Ass.
1767, *coram*
Yates, J.
Park, 295. A ship was insured from *Dartmouth* to *Liverpool*; she put into *Loe*, a place she must of necessity pass by; and although no accident befel her in going into or coming out of *Loe* (for she was lost after she got out to sea), it was held to be a deviation.

Townson
v. Guyon,
before Lord
Mansfield, *ibid.* A ship being insured from *Dunkirk* to *Leghorn*, comes to *Dover* for a *Mediterranean* pass, and it was held to be a deviation.

Ibid. by
Lee, C. J. If the master of a vessel put into a port not usual, or stay an unusual time, it is a deviation.

Elliot v.
Wilson,
7 Br. P. C.
459. The insured ordered their broker to insure on a particular vessel from *Carron* to *Hull*, with liberty to call as usual. These instructions were entered in the broker's books, and the insurer subscribed a policy on the goods, "at and from the loading there; of, on board the said ship at *Carron* wharf, and to continue and endure until the said ship (being allowed a liberty to call at *Leith*), shall arrive at *Hull*" It being usual for these vessels to call at *Borrowstones*, *Leith*, and *Merison's Haven*, this vessel stopt at the latter; and received no damage in going into or coming out of it. The courts in *Scotland* held it was no deviation; but their judgment was reversed in the House of Lords.

Peatson v.
Howard,
6 Term
Rep. 531. If several places are named in the policy, the ship must go to those places in the order in which they are named, unless some usage, or some special facts be proved, to vary the general rule.

Clafon v.
Simmond,
Sittings at
Guildhall, Hil. 1741. If the deviation be but for a single night, or for an hour, it is fatal.

Cock v.
Townson,
C. B. before
Lord Cam-
den. A ship was bound from *Cork* to *Jamaica*, under convoy. Being of force, she, with two other vessels, took advantage of the night, and cruised in hopes of meeting with a prize; it was held a deviation.

Jolly v.
Walker,
Sittings at
Guildhall
after East. 1781. But, if a merchant ship carry letters of marque, she may chase an enemy, though she may not cruise, without being deemed guilty of a deviation.

Moss v.
Byrom,
6 Term
Rep. 379. If the insured, without the knowledge of the underwriters, take out a letter of marque, (but without a certificate, which by the prize act of the 33 Geo. 3. c. 66. § 15. is absolutely necessary to its validity,) for the purpose of inducing the seamen to enter, and without any intention of cruising, this does not so essentially vary the risk, as to avoid the policy.

Murdock
v. Potts,
Sittings at
Guildhall,
after Tr.
1795. In an action on a policy of insurance on freight of the ship *Bethiab* at and from *Bourdeaux* to *Virginia*, warranted *American* ship and property; the declaration alleged, that the ship was an *American* ship, and the property of *American* subjects. The plaintiff proved the ship to be *American*, and it was to have been contended,

contended, that the warranty extended to the goods on board as well as to the ship; but upon the evidence it appeared, that the goods, whether *American* or not, were to be carried in the ship from *Bourdeaux* to *Saint Domingo*, and that she was only to call at *Norfolk* in *Virginia* for orders; so that it was unnecessary to decide or discuss the question upon the construction of the warranty, Lord *Kenyon* being of opinion, that the underwriters upon this policy had a right to expect, that the goods upon which the freight was payable were consigned to *Virginia*; and that if the freight was payable for the carriage of them from *Bourdeaux* to *Saint Domingo*, the underwriters were not liable for the loss, though the ship was to call at *Norfolk* for orders, the freight payable being in such case different from the freight insured. The plaintiff was accordingly nonsuited, and no application was made to set the nonsuit aside.

Wherever the deviation is occasioned by absolute necessity; as, where the crew forced the captain to deviate, the underwriter continues liable.

If a ship is decayed, and goes to the nearest port to refit, it is no deviation.

Wherever a ship, in order to escape a storm, goes out of the direct course; or when, in the due course of the voyage, she is driven out of it by stress of weather; this is no deviation.

If a storm drive a ship out of the course of her voyage, and she do the best she can to get to her port of destination, she is not obliged to return to the point from which she was driven.

A deviation may also be justified, if done to avoid an enemy, or to seek for convoy; because it is in truth no deviation to go out of the course of a voyage, in order to avoid danger, or to obtain a protection against it.

In an action upon a policy, which was to insure the *William Galley* in a voyage from *Bremen* to the port of *London*, warranted to depart with convoy, the case was this: the *Galley* set sail from *Bremen*, under convoy of a *Dutch* man of war to the *Elbe*, where they were joined by two other *Dutch* men of war, and several *Dutch* and *English* merchant ships, whence they sailed to the *Texel*, where they found a squadron of *English* men of war and an admiral. After a stay of nine weeks, they set out from the *Texel*, and the *Galley* was separated in a storm, and taken by a *French* privateer, taken again by a *Dutch* privateer, and paid 80*l.* salvage. It was ruled by Lord Chief Justice *Holt*, that the voyage ought to be according to usage, and that their going to the *Elbe*, though in fact out of the way, was no deviation; for till after the year 1703, there was no convoy for ships directly from *Bremen* to *London*. And the plaintiff had a verdict.

On an insurance from *London* to *Gibraltar*, warranted to depart with convoy, it appeared, there was a convoy appointed for that trade at *Spithead*, and the ship *Ranger* having tried for convoy in the *Downs*, proceeded to *Spithead*, and was taken in her way

Elton v.
Brogden,
2 Str. 1264.

Affurance Company, London
1 Atk. 545.

Motteux v.
Harrington
v. Halkeid,
Sittings at
Mich. 1783.

Delaney v.
Stoddart,
1 Term
Rep. 22.

Bond v.
Gonfales,
2 Salk. 443.

Gordon v.
Morley,
Campbell v.
Bordieu,
2 Str. 1263.

thither. The insurers insisted, that this being the time of a *French* war, the ship should not have ventured through the channel, but have waited in the *Downs* for an occasional convoy: and many merchants and office-keepers were examined to that purpose. But Lord Chief Justice *Lee* held, that the ship was to be considered as under the defendant's insurance to a place of general rendezvous, according to the interpretation of the words *warranted to depart with convoy*. And if the parties meant to vary the insurance from what is commonly understood, they should have particularized her departure with convoy from the *Downs*. The juries were composed of merchants; and in both cases they found for the plaintiffs upon the strength of this direction.

Cowp. Rep.
601.

In the case of *Bond* against *Nutt*, the point of deviation for the purpose of procuring convoy also came under the consideration of the court. Upon that occasion, Lord *Mansfield* and the whole court held, that if a ship go to the usual place of rendezvous, for the sake of joining convoy there ready, though such place be out of the direct course of the voyage, it is no deviation.

Enderby and
Another v.
Fletcher,
Sittings in
London,
Trin. Vac.
1780.

And in a more modern case, the only question was, whether there was a deviation or not. Lord *Mansfield* there directed the jury to find for the plaintiffs, if they believed that the captain fairly and *bond fide* acted according to the best of his judgment: that he had no other view or motive but to come the safest way home, and to meet with convoy; for that it was no deviation to go out of the way to avoid danger.

In our law books it is sometimes said, that a deviation may be justified by the usage and custom of the trade. But that is not quite correct; for if by the usage of any particular trade, it is customary to stop at certain places, lying out of the direct course from *A.* to *B.*, it is not a deviation to stop there; because it is a part of the voyage. There is no deception upon the insurer; because he is bound to take notice of the usages of trade; they are notorious to all the world; and when the usage has declared it lawful in a specific voyage to go to any place, though out of the immediate track, it is as much a part of the contract of insurance between the parties, as if it had been particularly mentioned. But in order to justify the captain of a ship in quitting the straight and direct line from the port of loading to that of delivery, there must be a precise, clear, and established usage upon the subject, not depending merely upon one or two loose and vague instances.

Salisbury v.
Townson,
Park, 309.

Where a ship was insured from *Liverpool* to *Jamaica*, and had put into the *Isle of Man*; it appeared that there were some instances of the *Liverpool* ships putting in there, but it was not the settled, common, established, and direct usage of the voyage and trade: it was therefore held a deviation, and the underwriters were discharged from any loss that happened subsequent to the deviation.

Cowp. 601.

Wherever a ship does that which is for the general benefit of all parties concerned, the act is as much within the intention and spirit of the policy, and, consequently, as much protected by it, as
if

if expressed in terms. And therefore in all cases, in order to determine whether a diversion from the direct course of the voyage is such a deviation as in law vacates the policy, it will be proper to attend to the motives, end, and consequences of the act, as the true criterion of judgment.

If any of the circumstances above stated do really and *bonâ fide* occur, so as to render a deviation absolutely necessary, the ship must pursue such *voyage of necessity* in the direct course, and in the shortest time possible, otherwise the underwriters will be discharged. Because a voyage superadded by necessity, ought to be subject to the same qualifications, and entitled only to the same sort of latitude as the original voyage, it having become, by operation of law, a part, as it were, of that original voyage.

But though an actual deviation from the voyage insured is thus fatal to the contract of insurance; yet a deviation merely intended, but never carried into effect, is considered as no deviation, and the insurer continues liable. This has been frequently so decided. Thus, in the case of an insurance from *Carolina* to *Lisbon*, and at and from thence to *Bristol*; it appeared, that the captain had taken in salt, which he was to deliver at *Falmouth*, before he went to *Bristol*; but the ship was taken in the direct road to both, and before she came to the point, where she would have turned off to *Falmouth*. It was held, that the insurer was liable; for it is but an *intention to deviate*, and that was held not sufficient to discharge the underwriter.

In the case of *Carter v. the Royal Exchange Assurance Company*, where the insurance was from *Honduras* to *London*, and a consignment to *Amsterdam*; a loss happened before she came to the dividing point between the two voyages, for which the insurers were held liable to pay.

The doctrine laid down in these cases has since been frequently recognized in subsequent decisions, and particularly by Lord Mansfield in the case of *Tkellusson v. Fergusson*. The insurance was from *Guadaloupe* to *Havre*, and one of the grounds of defence was, that the ship never sailed from *Guadaloupe* to *Havre*, but on a voyage from *Guadaloupe* to *Brest*. Lord Mansfield, in answer, said, "the voyage to *Brest* was, at most, but an *intended deviation*, "not carried into effect."

If, however, it can be made appear by evidence, that it never was intended, nor came within the contemplation of the parties, to sail upon the voyage insured; if all the ship's papers and documents be made out for a different place from that described in the policy, the insurer is discharged from all degree of responsibility, even though the loss should happen before the dividing point of the two voyages. This distinction was very properly taken by the court of King's Bench, in a very modern case: and by that distinction they admitted the general doctrine, with respect to the intention to deviate, in its fullest extent.

The ship *Molly*, being insured "at and from *Maryland* to "Cadiz," was taken in *Chesapeake Bay*, in the way to *Europe*. Upon this the insured brought this action against the defendant,

Lavabre v.
Walter,
Douglt. 271.

Foster v.
Wilmer,
2 Stra. 1249.

Ld. Ch. Just.
Lee.

2 Stra. 1249.

Douglt. 345.

Wooldridge
v. Boydell,
Douglt. 16.

one of the underwriters on the policy. The trial came on at *Guildhall* before Lord *Mansfield*, when a verdict was found for the defendant. A new trial being moved for, the material facts of the case appeared to be as follows:—The ship was cleared from *Maryland* to *Falmouth*, and a bond given that all the enumerated goods should be landed in *Britain*, and all the other goods in the *British* dominions. An affidavit of the owner stated that the vessel was bound for *Falmouth*. The bills of lading were, “To *Falmouth* and a market:” and there was no evidence whatever that she was destined for *Cadiz*. The place where she was taken, was in the course from *Maryland* both to *Cadiz* and *Falmouth*, before the dividing point. Many circumstances led to a suspicion that she was, in truth, neither designed for *Falmouth* nor *Cadiz*, but for the port of *Boston*, to supply the *American* army; but there was not sufficient direct evidence of that fact. At the trial, Lord *Mansfield* told the jury, that if they thought the voyage intended was to *Cadiz*, they must find for the plaintiff. If, on the contrary, they should think there was no design of going to *Cadiz*, they must find for the defendant. It also appeared in evidence, that the premium to insure a voyage from *Maryland* to *Falmouth*, and from thence to *Cadiz*, would have greatly exceeded what was paid in this case. Upon the motion for a new trial being argued, the counsel for the plaintiff cited the two cases above stated from *Strange’s Reports*.

Lord *Mansfield*.—The policy on the face of it, is from *Maryland* to *Cadiz*, and therefore purports to be a direct voyage to *Cadiz*. All contracts of insurance must be founded in truth, and the policies framed accordingly. When the insured intends a deviation from the direct voyage, it is always provided for, and the indemnification adapted to it. There never was a man so foolish as to intend a deviation from the voyage described, when the insurance is made, because that would be paying without an indemnification. Deviations from the voyage insured arise from after-thoughts, after-interest, after-temptation; and the party, who actually deviates from the voyage described, means to give up his policy. But a deviation merely intended, but never carried into effect, is as no deviation. In all the cases of that sort, the *terminus a quo*, and *ad quem*, were certain and the same. Here, was the voyage ever intended for *Cadiz*? There is not sufficient evidence of the design to go to *Boston*, for the court to go upon. But some of the papers say to *Falmouth* and a market: some to *Falmouth* only. None mention *Cadiz*, nor was there any person in the ship, who ever heard of any intention to go to that port. A market is not synonymous to *Cadiz*; that expression might have meant *Naples*, *Leghorn*, or *England*. No man upon the instructions would have thought of getting the policy filled up to *Cadiz*. In short, that was never the voyage intended, and, consequently, is not what the underwriters meant to insure.

In a later case the same doctrine was holden, viz. that if a ship be insured from a day certain from *A.* to *B.*, and, before the day, sail on a different voyage from that insured, the assured cannot

recover;

recover; even though the ship afterwards fall into the course of the voyage insured, and be lost after the day on which the policy was to have attached.

An insurance was at and from *Grenada* to *Liverpool*, the ship sailed from *Grenada* bound for *Liverpool*, but with a design formed before the commencement of the voyage, as appeared by the clearances, and was admitted on all sides, to touch at *Corke*, in her way to *Liverpool*, but was totally lost, before she arrived at the dividing point. The court of *C. P.* held, that where the *termini* of the intended voyage were really the same as those described in the policy, it was to be considered as the same voyage, and a design to deviate, not effected, would not vitiate the policy. That in *Wooldridge v. Boydell*, it appeared, there was no intention in the ship to go to *Cadiz*, which was mentioned as her port of delivery, at all; and in *Way v. Modigliani*, there was an actual deviation, by the ship going to fish on the banks of *Newfoundland*: these cases therefore were wholly different from the present, for here, the ship was really bound to *Liverpool*, though there were also clearances for *Corke*.

Kewley v.
Ryan,
2 H. Bl.
Rep. 343-

From the proposition just established, namely, that a mere intention to deviate will not vacate the policy, it follows as an immediate consequence, that whatever damage is sustained before actual deviation, will fall upon the underwriters.

Thus it was held by Lord Chief Justice *Holt*, who said, that if a policy of insurance be made to begin from the departure of the ship from *England* until, &c., and after the departure a damage happen, &c., and then the ship deviate; though the policy is discharged from the time of the deviation, yet, for the damages sustained before the deviation, the insurers shall make satisfaction to the insured.

Green v.
Young,
2 Ld Raym.
840.
2 Salk. 444-
S. C.

Subject to the rules already advanced, deviation or not is a question of fact, to be decided according to the circumstances of the case.

Dougl. 753.

In cases of deviation, the premium is not to be returned; because the risk being commenced, the underwriter is entitled to retain it.

A warranty, in a policy of insurance, is a condition or a contingency, that a certain thing shall be done, or happen; and unless that is performed, there is no valid contract. It is immaterial for what end the warranty is inserted in the contract; but being inserted, it becomes a binding condition upon the insured, and he must shew a *literal* compliance with it.

1 Term
Rep. 345.

Neither is it any matter whether the loss happen in consequence of the breach of warranty or not; for the very meaning of inserting a warranty is to preclude all inquiry about its materiality.

Ibid.

It is also immaterial to what cause the non-compliance is to be attributed; for although it might be owing to wife and prudential reasons, the policy is avoided.

Cowp. 607.

In this strict and literal compliance with the terms of a warranty consists the difference between a warranty and representation.

Id. 708.

Cowp. 708.

In order to make *written* instructions binding as a warranty, they must appear on the face of, and make a part of, the policy.

Dougl. 12.
notes.

Even though a written paper be *wrapped up in the policy*, and shewn to the underwriters at the time of subscribing; or even *though it be wafered to the policy*, it is not a warranty but a representation.

Thus, when evidence was offered to prove that a paper inclosed was always deemed a part of the policy, Lord *Mansfield* refused to hear it.

Bean v.
Stupart,
Dougl. 10.

A warranty written *in the margin* of the policy is considered to be equally binding, and liable to the same strict construction, as if written in the body of the policy.

Kenyon v.
Berthon,
Dougl. 12.

Words written transversely on the policy were held to be a warranty.

De Hahn
v. Hartley,
1 Term
Rep. 343.

Where it was said *in the margin* that the ship sailed from *Liverpool* with 50 hands and upwards, the court held this was a warranty; and as she in fact sailed from *Liverpool* with only 46, though she had upwards of 50 hands from *Beaumaris*, which is within six hours sail from *Liverpool*, the underwriters were discharged.

Hore v.
Whitmore,
Cowp. 784.

If a man warrant to sail on a particular day, and be guilty of a breach of that warranty, the underwriter is no longer answerable: and this rule holds, though the ship be delayed for the best and wisest reasons, or even though she be detained by force. Thus, where a ship was insured at and from *Jamaica*, warranted to sail on or before the 26th of *July*; and it appeared that the ship was ready, and would have sailed on the 25th, *if she had not been restrained by the order and command of Sir Basil Keith, governor of Jamaica, and detained beyond the day*; the insurer was discharged.

Vezian v.
Grant,
exram Bul-
ler, J. after East. 1779.

If the warranty be to sail *after* a specifick day, and the ship fail before, the policy is equally avoided as in the former case.

Upon a warranty to sail on or before a particular day, if the ship failed before the day from her port of loading, *with all her cargo and clearances on board*, to the usual place of rendezvous at another part of the island, merely for the sake of joining convoy, it is a compliance with the warranty, though she be afterwards detained there by an embargo, beyond the day. But if her cargo was not complete, it would not be a commencement of the voyage.

Bond v.
Nutt,
Cowp. 601.

A ship being insured at and from *Jamaica* to *London*, warranted to sail on or before the 1st of *August*, was *completely laden* for her voyage to *England*, at *St. Ann's* in *Jamaica*, and sailed from thence on the 26th of *July*, for *Bluefields*, in order to join the convoy there; but was detained by an embargo till the 6th of *August*. The court held that the sailing from *St. Ann's* was the commencement of the voyage. For when a ship leaves her port of loading, having a full and complete cargo on board, and having no other view but the safest mode of sailing to her port of delivery, her voyage must be said to commence from her departure from that port.

The same doctrine was advanced, even though it was a condition inserted in one of the ship's clearances, that *she should pass by the place* (at which she was detained by the governor beyond the day named in the warranty) to take the orders of government.

Thellusson v. Ferguson, Dougl. 346.

Thus also, where an embargo was actually published, before the ship sailed, and the captain, immediately after crossing the bar, returned to make a protest, and knowingly sent his ship into the embargo; yet as he swore, that he believed the embargo would be immediately taken off, the underwriter was held liable.

Earle v. Harris, at Guildhall, Hil. Vac. 1780.

If the insured warrant that the vessel shall depart with convoy, and it do not; the policy is defeated, and the underwriter is not responsible.

A convoy means a naval force, under the command of that person whom government may happen to appoint.

Therefore, where a ship put herself under the direction of a man of war till she should join the convoy, which had left the usual place of rendezvous before she arrived there; it was held not to be a departure with convoy, although she, in fact, joined, and was lost in a storm.

Hibbert v. Pigou, B. R. East. 23 Geo. 3. Park, 339. 24. Whether sailing

orders from the commander in chief to the particular ships are necessary to constitute a convoy?

But a convoy appointed by the admiral, commanding in chief upon a station abroad, is a convoy appointed by government.

A sailing with convoy from the usual place of rendezvous, as *Spithead* for the port of *London*, is a departure with convoy, within the meaning of such a warranty.

Lethullier's case, 2 Salk. 443. Gordon v. Morley, 2 Str. 1265. S. P.

Although the words used generally are "to depart with convoy," or "to sail with convoy," yet they extend to sail with convoy throughout the voyage.

2 Salk. 443. Jeffreys v. Legendra, 3 Lev. 320. Lilly v. Ewer, Dougl. 71.

But an unforeseen separation from convoy is an accident to which the underwriter is liable.

It hath been so determined where a ship was separated from her convoy by storm, and by storm prevented from rejoining it, and was lost. And even where the ship has by tempestuous weather been prevented from joining the convoy, at least, so as to receive the orders of the commander of the ships of war, if she do every thing in her power to effect it, it shall be deemed a sailing with convoy.

Victoria v. Cleve, 2 Str. 1250.

But it is otherwise, if the not joining be owing to the negligence and delay of the captain. As, where repeated signals for sailing had been made the night before, and continued next day from 7 till 11; notwithstanding which the ship insured did not sail till two hours after.

Taylor v. Woodmefs, Sittings at Guildhall, Hil. Vac. 4 Geo. 3. Park, 349.

But if the course upon a particular voyage has been to have a relay of convoy, protecting the trade from one port to another; or, if government appoint a convoy to escort the trade of a place to a given latitude, and no farther; and there be no convoy on that station; a vessel, taking advantage of such a convoy, has complied with the warranty to sail with convoy for the voyage.

De Gray v. Clapgett, Lond. Sittings, after Mich. 1795. D'Eguino v. Bewicke, 2 H. Bl. 551.

If

If a man warrant the property to be neutral, and it is not, the policy is void *ab initio*.

Woolmer v. Muilman, 4 Burr. 1119. 1 Pl. Rep. 427. In an insurance upon goods, the insured warranted the ship and goods to be neutral; it was expressly found by the jury that they were not neutral. The court therefore, though the loss happened by storms, and not by capture, declared that the contract was void.

Eden v. Parkinson, Dougl. 705. **Tyson v. Gurnee,** 3 Term Rep. 477. If the ship and property are neutral at the time when the risk commences, this is a sufficient compliance with a warranty of neutrality. The insurer takes upon himself the risk of war and peace; for if the property be neutral at the time of failing, and a war break out the next day, the insurer is liable.

Bernardi v. Motteux, Dougl. 574. The sentence of a foreign court of Admiralty is not conclusive, to shew that a ship was not neutral, unless it appear that the condemnation went on that ground.

Barzillay v. Lewis, B. R. Tr. 22 Geo. 3. Park, 359. But if it appear evident that the sentence proceeded upon the ground of the property not being neutral, that is conclusive evidence against the insured, that he has not complied with his warranty, and the underwriter is discharged.

Salucci v. Woodmest, B. R. Hil. 24 Geo. 3. Park, 361. And even where no special ground of condemnation is stated, but the ship is condemned as good and lawful prize, the court here must consider it as conclusive evidence that the property was not neutral.

Mayne v. Walter, B. R. East. 22 Geo. 3. Park, 363. But if the ground of decision appear to be a foreign ordinance, manifestly unjust, and contrary to the laws of nations, and the insured has only infringed such a partial law, that shall not be deemed a breach of his warranty, so as to discharge the insurer.

Salucci v. Johnson, B. R. Hil. 23 Geo. 3. Park, 364. If the ship be condemned as prize, and the grounds of the sentence appear manifestly to contradict such a conclusion, the court here will not discharge the insurers, by declaring that the insured has forfeited his neutrality.

Simond v. Boydell, Dougl. 255. A clause was inserted that 8 *l. per cent.* of the premium should be returned, if the ship sailed from any of the *West India* islands with convoy for the voyage, and arrives. The court held, that the arrival of the ship, whether with or without convoy, entitled the party to a return of the premium stipulated.

Cowp. 668. 3 Burr. 1237. If the risk is not run, whether the cause of its not being run is attributable to the *fault, will,* or *pleasure* of the insured, the premium is to be returned.

Lowry v. Bourdieu, Dougl. 251. **Andrieu v. Fletcher,** 3 Term Rep. 266. When a policy is void as a wager policy, and the ship has arrived safe, the court will not allow the insured to recover back the premium; though it might perhaps be otherwise where the ship has not arrived.

Where the risk has *once* commenced, there shall be no apportionment or return of premium afterwards.

But if there are two distinct points of time, or, in effect, two voyages either in the contemplation of the parties, or by the usage of trade, and only one of the two voyages was made, the premium shall be returned on the other, though both are contained in one policy.

Thus,

Thus, in an insurance "at and from *London to Halifax*, warranted to depart with convoy from *Portsmouth*," when the ship arrived at *Portsmouth*, the convoy was gone; the premium for the voyage from *Portsmouth to Halifax* was returned.

Stevenfon v. Snow,
3 Burr.
1237.
1 Bl. Rep. 318. S. C.

A ship was insured for twelve months, at 9*l. per cent.*, warranted free from *American* captures. The ship was taken within two months by the *Americans*. There shall be no return of premium, because the contract was entire; the premium was a gross sum stipulated and paid for twelve months.

Tyrie v.
Fletcher;
Cowp. 666.

So also, it was held, where a ship, insured for twelve months, was lost at the end of two; though the whole premium of 18*l.* was acknowledged to be received at the rate of 15*s. per month*; for that is only a mode of computing the gross sum.

Loraine v.
Thomlinson,
Douglass, 564.

Where the premium is entire in a policy on the voyage, where there is no contingency at any period, out or home, upon the happening or not happening of which, the risk is to end, nor any usage established upon such voyage; though there be several distinct ports, at which the ship is to stop, yet the voyage is one, and no part of the premium shall be recoverable. It was so held in a case, where a ship was insured "at and from *Honfleur* to the coast of *Angola*, during her stay, and trade there, at and from thence to her port or ports of discharge in *St. Domingo*, and at and from *St. Domingo* back to *Honfleur*;" and the policy was at an end by her deviation, before she arrived at *St. Domingo*; and, consequently, for the latter part of the voyage insured, the insurer ran no risk.

Bermon v.
Woodbridge,
Douglass, 751.

It was also held where a ship was insured "at and from *Ja-maica*, warranted to sail on or before the first of *August*, to return eight *per cent.* if she sailed with convoy;" and she did not sail till *September*; that there should be no return upon the warranty of the time of sailing; for the court cannot make a distinction between the risk *at* and the risk *from*: though it will be otherwise, if the jury find an express usage upon the subject of return of premium. Indeed, it seems that there never has been an apportionment unless there be something like an usage found to direct the judgment of the court.

Long v.
Allen,
B. R. East,
25 Geo. 3.
Park, 390.

Park, 391.

In an action upon a policy of insurance it appeared, that a clause was inserted, that in case of any loss or dispute about the policy, it should be referred to arbitration: and the plaintiff averred in his declaration, that there had been no reference. Upon the trial at *Guildhall*, the point was reserved for the consideration of the court, whether this action would lie before a reference had been made; and it was held by the whole court, that if there had been a reference depending, or made and determined, it might have been a bar; but the agreement of the parties cannot oust this court; and as no reference has been, not any is depending, the action is well brought, and the plaintiff must have judgment.

Kill v.
Hollister,
1 Will. 129.

If the plaintiff in his declaration allege, that a total loss has happened, and lay the damages as for a total loss, it shall be no bar to his recovery, though he can only prove a partial loss; for

Gardiner v.
Croafdale,
2 Burr.
904. 1 Bl.
Rep. 193.

in an action for damages merely, a man may always recover *less*, but never *more* than the sum he has laid in his declaration. A contrary doctrine was once attempted to be maintained; but was unanimously over-ruled.

Page v.
Rogers,
Sittings at
Guildhall,
Hil. Vac.
1785.

An action was brought on a policy of insurance, in which the declaration stated, that the plaintiff was possessed of one-third of the ship on which the insurance was made. It was proved that the plaintiff had purchased the whole ship at one period; and as there was no evidence to shew that he had since parted with any share of it, the counsel for the defendant insisted, that the plaintiff had not proved his declaration, which alleged him to have but one-third. Lord *Mansfield* over-ruled the objection, saying, that this was *prima facie* sufficient evidence; for *omne majus continet in se minus*.

By 19 G. 2. c. 37. § 6. it is declared, "That in all actions or suits brought or commenced by the assured, upon any policy of assurance, the plaintiff in such action or suit, or his attorney or agent, shall, within fifteen days after he or they should be required so to do in writing by the defendant, or his attorney or agent, declare what sum or sums he had assured, or caused to be assured in the whole, and what sums he had borrowed at *respondentia* or bottomry, for the voyage in question in such suit or action."

And by § 7. it is enacted, "That it shall and may be lawful for any person or persons, body or bodies corporate, sued in any action or actions of debt, covenant, or any other action or actions, on any policy or policies of insurance, to bring into court any sum or sums of money; and that if any such plaintiff or plaintiffs refuse to accept such sum or sums of money so brought into court as aforesaid, with costs to be taxed, in full discharge of such action or actions, and afterwards proceed to trial in such action or actions; and the jury do not assess damages to such plaintiff or plaintiffs, exceeding the sum or sums of money so brought into court, such plaintiff or plaintiffs, in every such case and cases, shall pay to such defendant or defendants, in every such action or actions, costs to be taxed; any law, custom, or usage to the contrary notwithstanding."

Russell v.
Boheme,
2 Strange,
1127.

A man having purchased goods beyond sea, in order to prove his property in the cargo, in an action upon a policy of insurance, produced a *bill of parcels* of one *Gardiner* at *Peterburgh*, with his receipt to it, and proved his hand. The defendant objected, that this was no evidence against the insurers; but the Chief Justice allowed it.

Smith v.
Lafceles,
2 Term
Rep. 187.

If a merchant abroad, who is interested in goods and the freight of a cargo, mortgage them to his creditor here for the payment of money at a certain day, and by a letter inclosing the bills of lading, direct an insurance, he has an insurable interest, although the mortgage was become absolute before the letter directing the insurance was received, and an action lies against the agent for not insuring agreeably to the instructions contained in such letter.

In an action on a policy of insurance, for insuring goods on board the ship *A*, the plaintiff declares, that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled. The evidence was, that many of the goods were spoiled, but some were saved; and the question was, Whether the plaintiff might give in evidence the expence of salvage, that not being particularly laid as a breach of the policy in the declaration?

Carey v. King,
Ca. temp.
Hardwicke,
B. R. 304.

Lord *Hardwicke*, C. J.—I think he may give it in evidence; for the insurance is against all accidents. The accident laid in this declaration is, that the ship sunk in the river; it goes on and says, that by reason thereof the goods were spoiled, that is the only special damage laid: yet it is but the common case of a declaration that lays special damage, where the plaintiff may give evidence of any damage that is within his cause of action as laid. And though it was objected, that such a breach of the policy should be laid, as the insurer may have notice to defend it; it is so in this case, for the plaintiff hath laid the accident, which is sufficient notice, because it must necessarily follow, that some damage did happen.

2. Of Insurances upon Lives.

It is enacted by 14 G. 3. c. 48. § 1. “That no insurance shall be made by any person or persons, bodies politick or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons, for whose use, benefit, or on whose account, such policies shall be made, shall have no interest, or by way of gaming or wagering; and every insurance made, contrary to the true intent and meaning thereof, shall be null and void to all intents and purposes.” And in order more effectually to guard against any imposition or fraud, and to be the better able to ascertain, what the interest of the person, entitled to the benefit of the insurance, really was, it was further enacted, by the same statute, “that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies, the person’s name interested therein, or for whose use, benefit, or on whose account, such policy was so made or underwritten. And that in all cases where the insured has an interest in such life or lives, event or events, no greater sum shall be recovered, or received from the insurer or insurers, than the amount or value of the interest of the insured in such life or lives, or other event or events.”

§ 2.

§ 3.

It has been holden, that a person holding a note given for money won at play, has not an insurable interest in the life of the maker of the note. An action was brought on a policy on the life of *James Russell* from the 1st of June 1784 to the 1st of June 1785. *Russell* was warranted in good health, and by a memorandum at the foot of the policy it was declared, that it was intended to cover the sum of 5000*l.* due from *Russell* to the plaintiff, for

Dwyer v. Edie, London, Sittings after Hil. 1782.

which he had given his note payable in one year from the 14th of May 1784. Two objections were made on the part of the defendant: 1st, That part of the consideration for the note was money won at play; 2d, That *Russell*, at the time he gave the note, was an infant.—*Buller*, J. nonsuited the plaintiff upon the ground of part of the consideration being for a gaming transaction, and that therefore there was a want of interest in the plaintiff. But as to the other objection on account of infancy, he said, the interest must be contingent, for *Russell* might or might not avoid his note; and he doubted much whether till so avoided, the note must not be taken against a third person to be the note of an adult, for the maker of the note only could take the objection.

Anderson
v. Edie,
Sittings at
Guildhall,
in Tr. 1795.

In an action on a policy of insurance on the life of Lord *Newhaven* from 1st December 1792 to 1st December 1793, the only question made by the defendant was as to the plaintiff's interest, which it was contended was not sufficient to take the case out of the above statute. It appeared in evidence, that Lord *Newhaven* was indebted to the plaintiff and a Mr. *Mitchell* in a large sum of money, part of which debt had been assigned by them to another person: the remainder, being more than the sum insured, was, upon a settlement of accounts between the plaintiff and *Mitchell*, agreed by them to remain to the account of *Mitchell* only.—Lord *Kenyon* was of opinion, that this debt was a sufficient interest: that a creditor had certainly an interest in the life of his debtor; the means by which he is to be satisfied may materially depend upon it; and at all events the death must in every case lessen the security. Verdict for the plaintiff.

Roeluck v.
Hammer-
ton, Cowp.
757.
Mollison v.
Staples,
Sittings at
Guildhall,
Mich. Vac.
1788.

A policy made, in order to decide upon the sex of a particular person, was held to fall within the prohibition of the statute. Again, a policy having been made, on the event of there being an open trade between *Great Britain* and the province of *Maryland*, on or before the 6th July 1778, Lord *Mansfield* said, that it was clear the plaintiff could not recover. 1st, Is this an interest within the act? It was made to prevent gambling policies. Every man in the kingdom has an interest in the events of war and peace: but, I doubt, whether that be an interest within the act. But, 2dly, The policy is void, by not having the name inserted according to the second section of the statute.

Park, 433.

In a life insurance, the insurer undertakes to answer for all those accidents, to which the life of man is exposed, except suicide, or the hands of justice.

The death must happen within the time limited in the policy; otherwise the insurers are discharged. And therefore, if a man receive a mortal wound during the existence of the policy, but does not in fact die till after, the insurers are not liable.

Patterfon
v. Black,
Sittings at
Guildhall,
after Hil.
1780.

But, if a man, whose life is insured, goes to sea, and the ship in which he sailed is never heard of afterwards, the question, whether he did or did not die within the term insured, is a fact for the jury to ascertain from the circumstances.

A policy

A policy was made for one year from the day of the date thereof: the policy was dated 3d September 1697. The person died on the 3d September 1698, about one o'clock in the morning; and the insurer was held liable.

Sir Robert Howard's case, 2 Saik. 625. 1 Ld. Raym. 480. S. C.

Where there is a warranty that the person is in good health, it is sufficient that he be in a reasonable good state of health; for it never can mean, that he is free from the seeds of disorder.

If the person, whose life was insured, laboured under a particular infirmity, if it be proved by medical men, that, in their judgment, it did not at all contribute to his death, the warranty of health has been fully complied with, and the insurer is liable.

Willis v. Poole, Sitings at Guildhall, after East. 1780. Cowp. 669. Dougl. 753.

If the person, whose life was insured, should commit suicide, or be put to death by the hands of justice, the next day after the risk commenced, there would be no return of premium.

3. Of Insurance against Fire.

The London Assurance Company insert a clause in their proposals, by which they declare, that they do not hold themselves responsible for any damage by fire, occasioned by an invasion, foreign enemy, or any military or usurped power whatsoever. Under this proviso, it was holden, that they were not exempted from loss by fire, occasioned by a mob at Norwich, which arose on account of the high price of provisions.

Drinkwater v. London Assurance, 2 Will. 363.

But the Sun-fire Office, in addition to these words, insert, "*civil commotions*," which words, it was determined, protected them from any responsibility for the losses occasioned by the rioters, who rose in London in 1780, to compel the repeal of a statute, which had passed in favour of the Roman Catholics.

Langdale v. Mason, Sitings at Guildhall, after Mich. 1780, *coram* Mansfield, C. J.

In a policy of assurance against loss by fire from half a year to half a year, the assured agreed to pay the premium half-yearly "as long as the assurers should agree to accept the same, *within fifteen days after the expiration of the former half-year*;" and it was also stipulated, that no insurance should take place till the premium was actually paid. A loss happened within fifteen days after the end of one half-year, but before the premium for the next was paid. It was holden, that the insurers were not liable, though the insured tendered the premium before the end of the fifteen days, but after the loss.

Tarleton v. Staniforth, 5 Term Rep. 695.

These policies of insurance are not, in their nature, assignable, for they are only contracts to make good the loss, which the contracting party himself shall sustain; nor can the interest in them be transferred from one person to another without the consent of the office (a). There is a case in which, by the proposals, these policies are allowed to be transferred, and that is, when any person dies, the policy and interest therein shall continue to the heir, executor, or administrator, respectively, to whom the property insured shall belong; provided, before any new payment be made,

(a) *Secus*, of marine insurances, Delaney v. Stoddart, 1 Term Rep. 26.

Lynch v.
Dalzell,
3 Br. P. C.
497. Sad-
ler's Com-
pany v.
Badcock,
2 Atk. 554.

such heir, executor, or administrator, do procure his or her right to be indorsed on the policy at the said office, or the premium be paid in the name of the said heir, executor, or administrator. But in all other cases there can be no assignment; and the party claiming an indemnity must have an interest in the thing insured at the time of the loss.]

(K) Of Bottomry [and Respondentia].

2 Blackst.
Com. 457.

Latch 252.

2 Blackst.
Com. 458.

2 Valin.
Com. p. 4.

2 Blackst.
Com. 458.

1 Sidisin,
27.

Melloy,
lib. 2. c. 11.
§ 8.

[THE contract of bottomry is in the nature of a mortgage of a ship, when the owner of it borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ship, as a security for the repayment: and it is understood, that if the ship be lost, the lender also loses his whole money; but if it return in safety, then he shall receive back his principal, and also the premium or interest stipulated to be paid, however it may exceed the usual or legal rate or interest. When the ship and tackle are brought home, they are liable, as well as the person of the borrower, for the money lent. But when the loan is not made upon the vessel, but upon the goods and merchandizes laden thereon, which, from their nature, must be sold or exchanged in the course of the voyage, then the borrower only is *personally* bound to answer the contract; who therefore in this case is said to take up money at *respondentia*. In this consists the difference between *bottomry* and *respondentia*: that the one is a loan upon the ship, the other upon the goods: In the former, the ship and tackle are liable, as well as the person of the borrower; in the latter, for the most part, recourse must be had to the *person* only of the borrower. Another observation is, that in a loan upon bottomry, the lender runs no risk though the goods should be lost; and upon *respondentia*, the lender must be paid his principal and interest, though the ship perish, provided the goods are safe. But in all other respects, the contract of bottomry and that of *respondentia* are upon the same footing; the rules and decisions applicable to one, are applicable to both; and therefore, in the course of our inquiries, they shall be treated as one and the same thing, it being sufficient to have once marked the distinction between them.

These terms are also applied to another species of contract, which does not exactly fall within the description of either, namely, to a contract for the repayment of money, not upon the ship and goods only, but upon the mere hazard of the voyage itself: as, if a man lend 1000*l.* to a merchant to be employed in a beneficial trade, with a condition to be repaid with extraordinary interest, in case a specifick voyage named in the condition shall be safely performed: which agreement is sometimes called *fœnus nauticum* or *usura maritima*. But as this species of bottomry opened a door to gaming and usurious contracts, especially in long voyages, the legislature, at the time it suppressed insurances upon wagging policies, introduced a clause, by which it was enacted,

acted, " That all sums of money lent on bottomry, or at *respons-* 19 Geo. 2.
 " *dentia* upon any ship or ships belonging to his Majesty's sub- c. 37. § 5.
 " jects, bound to or from the East Indies, should be lent only on
 " the ship, or on the merchandize or effects, laden or to be laden
 " on board of such ship, and should be so expressed in the con-
 " dition of the said bond; and the benefit of salvage should be
 " allowed to the lender, his agents or assigns, who alone should
 " have a right to make assurance on the money so lent; and in
 " case it should appear that the value of his share in the ship, or
 " in the merchandizes or effects laden on board of such ship,
 " did not amount to the full sum or sums he had borrowed as
 " aforesaid, such borrower should be responsible to the lender for
 " so much of the money borrowed, as he had not laid out on
 " the ship or merchandizes laden thereon, with lawful interest
 " for the same, in the proportion the money not laid out should
 " bear to the whole money lent, notwithstanding the ship and
 " merchandizes should be totally lost."

This statute has entirely put an end to that species of contract which was last mentioned, namely, a loan upon the mere voyage itself, as far, at least, as relates to *India* voyages; but as none other are mentioned, and as *expressio unius est exclusio alterius*, these loans may be made in all other cases, as at the common law, except in the following instance, which is another statute prohibition. It is declared, that all contracts made or entered into by any of his Majesty's subjects, or any persons in trust for them, for or upon the loan of any monies by way of bottomry on any ship or ships in the service of foreigners, and bound or designed to trade in the *East Indies* or parts aforesaid shall be null and void.

7 Geo. 1.
c. 21. § 2.

This act it should seem does not mean to prevent the King's subjects from lending money on bottomry on foreign ships trading from their own country to their settlements in the *East Indies*. The purpose of the statute was only to prevent the people of this country from trading to the *British* settlements in *India* under foreign commissions, and to encourage the lawful trade thereto. It lately became a question in the Common Pleas, Whether an *American* ship since the declaration of *American* independency was a foreign ship within the statute 7 G. 1. c. 21. § 2.? It came before the court on a motion to discharge the defendant out of custody upon entering a common appearance. The defendant was holden to bail upon a *respondentia* bond, which was executed by the defendant, who was an *American*, to secure the payment of a cargo shipped by the plaintiff on board an *American* ship in the *East Indies*, homeward-bound from *Calcutta* to *Rhode Island* in *America*. The ship had sailed from *England*, and landed a cargo of *European* goods in *Bengal*, previously to her taking in the cargo on which the bond was given. The court were much inclined to think that the bond was void, the case being within the mischief intended to be remedied by the act: but as the question was of considerable consequence, they thought it not proper to be discussed on this

Sumner
v. Gree,
Mich.
30 Geo. 3.
C. B.

summary application; but they ordered the defendant to be discharged on the ground that where it appeared from the affidavit to hold to bail, that there was a probability of the contract being void, on which the action was founded, it would be wrong to detain the defendant in prison; more particularly as the plaintiff would by that means have an opportunity of tampering with the defendant in prison, and of escaping from the penalties of the act, and of preventing the case from being brought before the court.]

2 Roll.
Rep. 48.
5 Co. 70.,
&c. Cro.
Jac. 208.
508.
1 Keb. 539.
711.

Where *A.* lends *B.* 100*l.* to freight a ship abroad, and it is agreed, that, if the ship comes home safe, *A.* shall have 150*l.* and that if she do not, that he shall lose the 100*l.*, this is not usury, but good by the custom of merchants, because of the great perils at sea, and both principal and interest run the same hazard of being lost. But if the principal be secured, and the interest only depend on an hazard, if it be more than is lawful, it is usury.

Joy v. Kent,
Hard. Rep.
413.

[Again, in debt upon an obligation, conditioned to pay so much money, if such a ship returned within six months from *Ostend* in *Flanders* to *London*, which was more by the third part than the legal interest of money; and if she did not return, then the obligation to be void: the defendant pleaded, that there was a corrupt agreement betwixt himself and the plaintiff, and that at the time of making the obligation, it was agreed betwixt them, that he should have no more for interest than the law permits, in case the ship should ever return; and averred that the obligation was entered into by covin, to evade the statute of usury, and the penalty thereof: upon this averment the plaintiff took issue, and the defendant demurred.—Lord Chief Baron *Hale*.—Clearly this bond is not within the statute, for this is the common way of insurance; and if this were void by the statute of usury, trade would be destroyed. It is not like to the case, where the condition of the bond is to give so much money, if such or such a person be then alive; for there is a certainty of that at the time. But it is uncertain and a casualty whether such a ship will ever return or not.]

Lev. 54.
Sid. 27.

So, where the condition of a bottomry-bond was, that if the obligor, or the ship, or the goods, return safe, then to pay more than the legal interest; this was adjudged good by the custom of merchants, though it depends on many contingencies; and though the obligee may be said to run little hazard; and though any of the contingencies become impossible; as, if the obligor die before his return, &c., yet the bond remains payable, contrary to the general rule of law in such cases; for the law supplies those words, *which shall first happen*, and forecloses the election of the obligor, and gives it to the obligee to take his, on which the contingencies shall first happen.

2 Chan.
Ca. 130.

The plaintiff entered into a penal bond of bottomry to pay 40*l.* per month for 50*l.*, the ship was to go from *Holland* to the *Spanish* islands, and so to return for *England*; but if she perished, the defendant was to lose his 50*l.* She went accordingly to the *Spanish* islands, took in *Moors* at *Africk*, and upon that occasion went to *Barbadoes*,

Barbadoes, and then perished at sea; the plaintiff, being sued on the bond and penalty, sought relief in equity, pretending that the deviation was of necessity; but his bill was dismissed, saving as to the penalty.

J. S. entered into a bottomry-bond, whereby he bound himself in consideration of 400*l.* as well to perform the voyage within six months, as at the six months end to pay the 400*l.* and 40*l.* premium, in case the vessel arrived safe, and was not lost in the voyage: it fell out that *J. S.* never went the voyage, whereby his bond became forfeited; and he preferred a bill to be relieved: and in regard the ship lay all along in the port of *London*, so that the defendant run no hazard of losing his principal; the Lord Keeper decreed, that he should lose the premium of 40*l.*, and be contented with his ordinary interest.

Vern. 263.
Deguiller v.
Depeister.

A part-owner of a ship borrowed money of the plaintiff upon a bottomry-bond, payable on the return of the ship from the voyage; she was then going in the service of the *East India Company*, and the *East India Company* broke up the ship in the *Indies*; the owners brought their action against the Company, and recovered damages, but they did not amount to a full satisfaction; and the obligee brought his bill to have his proportionable satisfaction out of the money recovered; but his bill was dismissed, and he left to recover as well as he could at law; the court declaring that they would never assist a bottomry-bond, which carried an unreasonable interest.

Abr. Eq.
372. Dandy
v. Turner.

[It seems to have been a doubt, late in the last century, whether a loss by the attacks of pirates was a risk which the lender on bottomry had by his contract undertaken to bear; for it was argued in the King's Bench, in the reign of *James the Second*. But the court were of opinion, that piracy was one of the dangers of the seas; and the defendant had judgment.]

Barton v.
Wolliford,
Comb. 56.

The lender is answerable likewise for losses by capture; or, to speak more accurately, if a loss by capture happen, he cannot recover against the borrower: but in bottomry and respondentia bonds, capture does not mean a mere temporary taking, but it must be such a capture as to occasion a total loss. And therefore if a ship be taken and detained for a short time, and yet arrive at the port of destination within the time limited, (if time be mentioned in the condition,) the bond is not forfeited, and the obligee may recover.

This doctrine was laid down by the whole court of King's Bench, in a case upon a bond of this nature; the proceedings on which were fully stated, when the unanimous opinion of the court was delivered by Lord *Mansfield*. This comes before the court upon a motion on the part of the defendant, for a new trial. It was an action of debt upon a bottomry bond; the condition of which was, that upon the ship's safe arrival at *New York*, a certain sum of money should be paid to the plaintiff; but that in case the ship should miscarry, be lost, cast away, or taken by the enemy, the plaintiff should have nothing. The defendant pleaded

Joice v.
William-
son, B. R.
Mich. Term
23 Geo. 3.
Park, 421.

three pleas: 1st, *Non est factum*; 2dly, That the ship did not arrive at *New York*, the port of destination; 3dly, That the ship was captured. Upon the two first pleas issue was joined; and to the last, there was a replication of recapture. The facts, which appeared in evidence on the trial, are these: *the ship was taken before her arrival at New York*, by two *American* privateers, which detained her for one month, and plundered her of her stores; at which time *she was retaken* by an *English* privateer, and carried into *Halifax*. The Admiralty court adjudged her to be a good prize to the *English* privateer, and decreed that she should be restored to the original owners, on paying one-eighth for salvage: that she proceeded with the remainder of her cargo to *New York*, and earned her freight: that the value of the ship was not sufficient to satisfy the bond. These are the facts. Now it is clear, that, by the law of *England*, *there is neither average nor salvage upon a bottomry-bond*. It was indeed contended at the bar, on the part of the defendant, that this case was within the saving of the bond; for it is provided, that in case of loss by capture, &c. the bond should be void: and that here there was a capture, and a detention for one month. But upon consideration, we think that a capture, within this condition, does not mean a *temporary capture*, but it *must be a total loss*: now here it was not such a capture as to occasion a total loss. The voyage was not lost, for the defendant pursued it and earned his freight. Freight depends upon the safety of the ship; and as the freight was earned, the ship must have arrived safe at the port of destination. In whatever way we determine this case, there must be a hardship: but we are all of opinion, that the verdict is right, and that the rule for a new trial must be discharged.

Walpole
v. Iwer,
Sittings
after Tr.
1789.

An action was brought on a policy of insurance, on a *respondentia* bond, on ship and goods at and from *B.* to *C.* The ship was *Danish*, and an average loss was sustained upon the goods to the amount of *6l. 15s. per cent.*, and the plaintiff as holder of a *respondentia* bond had been called upon to contribute; and now brought his action against the *English* underwriters for the amount of that contribution. Lord *Kenyon*.—By the law of *England*, a lender upon *respondentia* is not liable to average losses, but is entitled to receive the whole sum advanced, provided that the ship and cargo arrive at the port of destination. The plaintiff contends that, as by the law of *Denmark*, such lenders upon *respondentia* are liable to average, and bound to contribute according to the amount of their interest, the insurer must answer to them. The *Danish* consul has proved that he received a judgment of the court of *Copenhagen*, the decretal part of which proves the law of *Denmark* to be as the plaintiff has stated it. The opinions of several men of eminence in that country have been offered on each side, but I reject them, because the solemn decision of a court of competent jurisdiction is of much greater weight than the opinions of advocates however eminent, or even than the extrajudicial opinions of the most able judges. It seems, as if in this case the underwriters

writers were bound by the law of the country to which the contract relates. Verdict for the plaintiff.

This is not the only case in which the insurers have been holden liable to indemnify, the insured having been obliged by the law of a foreign country to pay a larger sum than by the laws of *England* could have been demanded: though to be sure, in the case about to be quoted, there seems to have been an usage proved, and upon that the learned Judge much relied. It was an action on a policy of insurance on a cargo of fish from *Newfoundland* to any part of *Spain, Portugal, or Italy*. The ship met with bad weather, and put into *Alicant* and *Leghorn* to repair. The captain being owner, presented a petition to the commercial court of *Pisa*, to adjust the general average, as he had put in for the general benefit of all concerned. The court, according to its usual course (which seems a very extraordinary one), adjusted the loss by charging the cargo at its full value, but the ship at one-half, and the freight at one-third, and they also charged as a part of the general average, the seamen's wages and provisions whilst in port. The defendant, as underwriter, had paid into court as much as would cover the average according to the memorandum in the policy, and the law and usage of *England*. The question was, Whether, the plaintiff having been compelled to pay beyond that sum according to the calculation of the sentence of the court of *Pisa*, it was conclusive upon the defendant, and the plaintiff was entitled to recover his average by the same standard? The plaintiff called several brokers, who said, that, in repeated instances, they had adjusted averages under similar sentences of the court of *Pisa*, and the underwriters, though with reluctance, had always paid them. *Buller, J.*—On the general law, the plaintiff would fail; but, in all matters of trade, usage is a sacred thing. I do not like these foreign settlements of average, which make underwriters liable for more than the standard of *English* money. But if you are satisfied it has been the usage upon the evidence given, it ought not to be shaken. The plaintiff had a verdict.

Newman v.
Cazalet, Sitt.
at Guildh.
after Hil.

It has been said, that if the accident happen by the default of the borrower, or of the captain, the lender is not liable, and has a right to demand the payment of the bond. If, therefore, the ship be lost by a wilful deviation from the tract of the voyage, the event has not happened, upon which the borrower was to be discharged from his obligation. This has been decided in several cases.

An action of debt was brought upon an obligation for performance of covenants in an indenture, wherein it was recited, that such a ship was in the service of the *East India Company*, and that it was to obey such orders as they or their factors should give; and that she was designed for a voyage from *London* to *Bantam*, and from thence to *China* or *Formosa*. The plaintiff lent 500*l.* upon the hull of the ship, and the defendant covenanted to pay, if the ship went from *London* to *Bantam*, and returned from thence directly to *London*, 550*l.*; if from *London* to *Bantam*, and from thence to

Western
v. Wildy,
Skin. 152.

China

China or Formosa, and returned to *London* within 24 months, 650*l.* If she returned not within 24 months, then to pay 5*l.* per month above 650*l.*, till 36 months; and if she returned not within 36 months, then to pay 710*l.*, unless it could be proved by *Wildy*, that the ship returned not, but was lost within 36 months. The ship, in fact, went from *London* to *Bantam*, and from thence to *Surat*, and other parts, and so returned to *Bantam*; and in her voyage from *Bantam* to *London* was lost within 36 months: upon which the present action was brought.

The court inclined to be of opinion, that this ship having deviated from the voyage described, in going to *Surat*, the plaintiff was not to bear the loss, and was consequently entitled to recover. They, however, took time to deliberate; and after consideration, gave judgment for the plaintiff.

Williams v.
Steadman,
Holt's Re-
ports, 126.
Skin. 345.
S. C.

In another case of debt upon a bottomry-bond, the defendant pleaded, that the ship went from *London* to *Barbadoes sine deviation*, and afterwards she returned from *Barbadoes* towards *London*, and in her return was lost in *voyagio prædicto*; the plaintiff replied, that the ship in her return went from *Barbadoes* to *Jamaica*; and that after a stay there, she returned from *Jamaica* towards *London*, and was lost, and so shews a deviation. The defendant rejoined, that she was pressed into the King's service, and so was compelled to go to *Jamaica*, which is the deviation pleaded by the plaintiff; without this, that she deviated after she was pressed. The plaintiff demurred, and judgment was given for the plaintiff. The plea of the defendant is not good; for he pleads that the ship went from *London* to *Barbadoes* without deviation, and that in the return she was lost in the voyage aforesaid; but does not shew *without deviation*. Now the condition is so in express words, and he ought to shew expressly that he has performed the words of the condition.

The same rule of decision has been adopted in the courts of equity.

1 Equity
Cases Abr.
372.
2 Chan.
Cases, 130.

The plaintiff entered into a penal bond to pay 40*s.* per month for 50*l.*, the ship was to go from *Holland* to the *Spanish islands*, and to return to *England*: but if she perished, the defendant was to lose his 50*l.* The ship went accordingly to the *Spanish* islands, took in *Moors* at *Africa*, then went to *Barbadoes*, and perished at sea. The plaintiff, being sued at law upon the bond, came into equity, suggesting that *the deviation was through necessity*. But his bill was dismissed, except as to the penalty.

It frequently happened that the borrowers on bottomry, or at *respondentia*, became bankrupts after the loan of the money, and before the event happened, which entitled the lender to repayment: by which means the debt could not be proved under the commission, and the lenders were left to such redress as they could obtain from the bankrupt, who had previously given up every thing to his other creditors. This being likely to prove a discouragement to trade, parliament was obliged to interpose; and it accordingly enacted, "That the obligee in
any

19 Geo. 2.
c. 52. § 2.

“ any bottomry or *respondentia* bond, made, and entered into upon a good and valuable consideration, *bona fide*, should be admitted to claim, and *after the contingency should have happened, to prove his or her debt or demands in respect of such bond, in like manner as if the contingency had happened before the time of the issuing of the commission of bankruptcy against any such obligor, and should be entitled unto, and should have and receive, a proportionable part, share, and dividend of such bankrupt's estate, in proportion to the other creditors of such bankrupt, in like manner as if such contingency had happened before such commission issued : and that all and every person or persons, against whom any commission of bankruptcy should be awarded, should be discharged of and from the debt or debts owing by him, her, or them, on every such bond as aforesaid, and should have the benefit of the several statutes now in force against bankrupts, in like manner, to all intents and purposes, as if such contingency had happened, and the money due in respect thereof had become payable, before the time of the issuing of such commission.”*

By the statute-book it appears, that the masters and mariners of ships, having taken upon bottomry greater sums of money than the value of their adventure, had been accustomed wilfully to cast away, burn, or otherwise destroy the ships under their charge, to the great loss of the merchants and owners: it was therefore enacted, “ That if any captain, master, mariner, or other officer belonging to any ship, should wilfully cast away, burn, or otherwise destroy the ship unto which he belonged, or procure the same to be done, he should suffer death as a felon.” The duration of this act having been limited to three years, it became extinct : but the necessity of such a provision was so great, that a similar law was made a few years afterwards, and is still in force.]

16 Cha. 2.
c. 6. § 12.

22 & 23
Cha. 2.
c. 11. § 12.

[(L) Of Bills of Lading.

A Bill of Lading is a memorandum or acknowledgment, signed by the master of a ship, that he has received certain goods, which he undertakes to deliver at the intended place to the person named in the bill of lading. It is, regularly, made treble; one for the merchant who loads the goods; another for the consignee of the goods; and the third for the master of the ship.

The bill of lading is assignable, the undertaking being, generally, to deliver to the order or assigns of the shipper. But whether the first indorsement or assignment passes the right of property, whether the instrument be negotiable or not, is a point upon which our courts have differed, and which hath not yet been settled.

See *Evans v. Martlett*,
1 *Ld. Raym.*
271.
Wright v. Campbell,
4 *Burr.*
2046.

1 *Bl. Rep.* 628. *S. C.* *Snee v. Prescott*, 1 *Atk.* 245. *Caldwell v. Ball*, 1 *Term Rep.* 205. *Hibbert v. Carter*, *id.* 745. *Lickbarrow v. Mason*, 2 *Term Rep.* 63. 1 *H. Bl.* 357. *S. C.* 5 *Term Rep.* 367. *S. C.* *Fearon v. Bowers*, 1 *H. Bl.* 364. note. *Salomons v. Nissen*, 2 *Term Rep.* 674.

But,

Wright v.
Campbell,
4 Burr.
2046. 1 Bl.
Rep. 628.
S. C.
Salomons
v. Nissen,
2 Term
Rep. 674.

But, admitting that the assignment of the bill of lading will in general transfer the property, yet, if there be any fraudulent circumstances between the assignor and the assignee, if the assignee has full notice that the vendor has not been paid for the goods, the assignment will not in that case divest the vendor of his legal right to stop them *in transitu* in the event of the consignee's insolvency.]

(M) Of Bills of Exchange.

1. Of the Nature and different Kinds of Bills of Exchange and Negotiable Notes : And herein,
 1. *Of Foreign Bills.*
 2. *Of Inland Bills.*
 3. *Of Promissory and Negotiable Notes.*
2. What shall be said a Bill of Exchange, or Negotiable Note, within the Custom of Merchants.
3. Who shall be said liable to the Payment thereof; and therein of suing the Drawer, Indorfor, or Acceptor.
4. Who shall be said entitled to the Money.
5. Of the Indorsement.
6. Of the Acceptance : And herein,
 1. *What shall be said a good Acceptance.*
 2. *Whose Acceptance shall bind.*
 3. *Whether an Acceptance may be qualified.*
7. Of the Protest : And herein,
 1. *Of the Necessity and Validity of the Protest.*
 2. *At what Time to be made, and therein of giving Notice to the Drawer; of the Drawer's Refusal, so as to entitle the Party to Principal, Interest, and Costs.*
8. Of the Action and Remedy on a Bill of Exchange, and Manner of declaring and pleading therein.

1. Of the Nature and different Kinds of Bills of Exchange and Negotiable Notes.

1. Of Foreign Bills.

THE custom of merchants, in relation to foreign bills of exchange, seems to have prevailed time out of mind; and was at first introduced for the expedition of trade and its safety, and to prevent the exportation of money out of the realm; and hath therefore been always countenanced and encouraged, as a matter of great ease and advantage to trade, and is now become part of the law of the land; and as bills of exchange are established merely by the custom of merchants, and for their benefit; so their rules and customs are allowed to prescribe their form and several properties, as to their creating engagements on the parties that are concerned in them.

For the antiquity of exchange, *vide* Molloy, 277. Malynes, 269. — That the true measure of exchange is *par pro pari*, or value for value. Molloy, 274. — Where

the King of Portugal lowered his coin, this not to prejudice the drawer here. — That originally there could be no exchange, without the king's licence. Molloy, 274.

By this custom, if a merchant abroad draw a bill on a merchant here, or *vice versa*, requesting him to pay a certain sum of money, and the drawer set his name to it; this amounts to a promise to pay, and subjects him, though but a collateral engagement, to an action on the non-payment.

Roll. Abr. 6. Cro. Jac. 306. Cro. Car. 301.

And if the drawee, or he on whom the bill is drawn, refuse to accept it, or, having accepted it, refuse to pay it, the payee, or he in whose favour it is drawn, may protest it, and shall recover against the drawer, not only the principal sum, but likewise all interests, costs, and damages, by reason of the protest or refusal of acceptance, or payment of the money.

Cro. Car. 301.

But though the custom of merchants, in relation to bills of exchange, be established by the common law, and such bills, being securities for money, are of great credit among them; yet are they not allowed to be securities of as high a nature as bonds or specialties; and therefore it hath been adjudged, that a bill of exchange is within the statute of (*a*) limitations, and must be sued for within six years after it becomes payable.

Carth. 3. Renew v. Axton, Show. 341. Comb. 190. S. P. 4 Mod. 105. Holt, 427. pl. 2.

bills of exchange, for value received, such matters of account, as are intended by the exception in the statute concerning merchants accounts. Carth. 226. But for this, *vide* tit. Limitation of Actions.

Vide head of Executors and Administrators.

Also, a bill of exchange is to be considered as a simple contract debt in a course of administration, which an executor or administrator cannot discharge before debts by bond, without being guilty of a *devastavit*.

So, if a merchant in London draw a bill of exchange on his correspondent in Newcastle, in favour of J. S., and the bill is refused, and J. S. dies intestate, his administrator, on letters of administration taken out in Durham, cannot bring an action, on the custom of merchants, against the drawer, and lay the same in London; for that a bill of exchange is not equal to a bond or specialty, which are the deceased's goods, where they happen to be at his death, but

Carth. 373. Yeomans v. Bradshaw, Comb. 392. S. C.

is

is a simple contract, which follows the person of the debtor, and makes *bona notabilia* where the debtor resides; and therefore administration ought to have been taken out in *London*.

[But bills of exchange and promissory notes, though, according to the general principles of the law, they are to be considered only as evidence of a simple contract, are yet so far regarded as specialties, that unless the contrary be shewn by the defendant, they are always presumed to have been made on a good consideration; nor is it incumbent on the plaintiff, either to shew a consideration in his declaration, or to prove it at the trial. Foreign bills were always entitled to this privilege; but it was not without a considerable struggle that it was extended to inland bills: and notes are indebted for it to the statute of *Queen Anne*.]

Also, this custom shall not prevail against the privilege of infants, so as to bind them; and accordingly it hath been adjudged, that if an infant draw a bill of exchange, infancy is a good plea in bar to an action brought against him*.

1 Bi. Rep.
445. Peck-
ham v.
Wood,
B. R. E.
18 Geo. 3.
Wide 2 Ld.
Raym. 753.
1 Bl. Rep.
487.

Carth. 160.
Williams v.
Harrison,
* Or it may
be given in
evidence on the
general issue.

Molloy,
276. (a) An
usage is
said to be
regularly a
month.
Molloy, 277.

Show. 317. Holt, 113. pl. 4. 12 Mod. 15.—But yet varies according to the custom of particular countries; and therefore, where the plaintiff declared on a bill of exchange drawn at Amsterdam, payable at London, at two usances, and did not shew what the two usances were, judgment was given for the defendant; for the court could not take notice of foreign usances which varied, being longer in one place than in another. Salk. 131. pl. 18. Buckley v. Campbell.—[Here it may be proper to mention, that usage between London and any part of France, is thirty days after date.—Between London and the following places; Hamburg, Amsterdam, Rotterdam, Middleburg, Antwerp, Brabant, Zealand, and Flanders, is one calendar month after the date of the bill.—Between London and Spain and Portugal, two calendar months.—Between London and Genoa, Leghorn, Milan, Venice, and Rome, three calendar months.—The usage of Amsterdam, on Italy, Spain, and Portugal, is two months.—On France, Flanders, Brabant, and on any place in Holland or Zealand, is one month.—On Frankfurt, Nuremberg, Vienna, and other places in Germany, on Hamburg and Breslau, fourteen days after sight, two usances twenty-eight days, and half usance seven.—Half usance when the usance is one month, shall contain fifteen days, notwithstanding the inequality in the length of the months.]——
(b) Therefore, if there are three bills for the same sum, and an action is brought on one of them, and the plaintiff declares, that the money in *billis prædictis mentionat*. is not paid; this is sufficient without averring, that it was not paid on the other bills, because the sum is the same in all the bills.

Starke v.
Cheesman,
Carth. 510.
1 Salk. 128.
East v.
Ellington,
1 Salk. 130.
2 Ld. Raym. 810.

[Where the time, after the expiration of which a bill is made payable, is limited by months, it must be computed by calendar, not lunar months: thus, on a bill dated the first of *January*, and payable at one month after date, the month expires on the first of *February*.

Bellasis v.
Heffer, Ld.
Raym. 281.
Coleman v.
Sayer, Str.
829.

Where a bill is payable at so many days after sight, or from the date, the day of presentment or of the date is excluded. Thus, where a bill, payable ten days after sight, is presented on the first day of a month, the ten days expire on the eleventh; where it is dated the first, and payable twenty days after date, these expire on the twenty-first. Where there is no date, and the payment is directed to be made so many days *after* date, the date is taken to be the day on which it issued.

A custom has obtained among merchants, that a person to whom a bill is addressed, shall be allowed a little time for payment, beyond the term mentioned in the bill, called days of grace. But the number of these days varies, according to the custom of different places.

Great Britain, Ireland, Bergamo, and Vienna, three days.

Frankfort, out of the time of the fair, four days.

Leipsick, Naumburg, and Augsburg, five days.

Venice, Amsterdam, Rotterdam, Middleburg, Antwerp, Cologne, Breslau, Nuremberg, and Portugal, six days.

Dantzick, Koningberg, and France, ten days.

Hamburg and Stockholm, twelve days.

Naples eight, Spain fourteen, Rome fifteen, and Genoa thirty days.

Leghorn, Milan, and some other places in Italy, no fixed number.

Sundays and holidays are included in the respite days at London, Naples, Amsterdam, Rotterdam, Antwerp, Middleburg, Dantzick, Koningberg, and France; but not at Venice, Cologne, Breslau, and Nuremberg. At Hamburg, the day on which the bill falls due makes one of the days of grace, but it is not so elsewhere.

In England, if the last of the three days happens to be Sunday, the bill is to be paid on Saturday.

But bills payable at sight, are to be paid without any days of grace.]

2. Of Inland Bills.

Inland bills of exchange are those drawn by one merchant residing in one part of the kingdom, on another residing in some city or town within the same kingdom; and these also, being found useful to trade and commerce, have been established on the same foot with foreign bills. But at common law they differed from them in this, that there was no custom of protesting them, so as to subject the drawer to interest and damages in case of non-payment, as there was on foreign bills.

To remedy this inconvenience, by the 9 & 10 W. 3. c. 17. reciting, that great damages and other inconveniencies do frequently happen in the course of trade and commerce, by reason of delays of payment and other neglects on inland bills of exchange, it is enacted, "That all and every bill or bills of exchange, drawn in, or dated at and from any trading city or town, or any other place in the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, of the sum of 5*l.* or upwards, upon any person or persons of or in London, or any other trading city, town, or any other place, (in which said bill or bills of exchange shall be acknowledged and expressed the said value to be received,) and is and shall be drawn payable at a certain number of days, weeks, or months after date thereof; that from and after presentation and acceptance of the said bill or bills of exchange, (which acceptance shall be by the underwriting the

6 Mod. 29.
80. Salk.
131. pl. 17.

" same

“ same under the party’s hand so accepting); and after the expira-
 “ tion of three days after the said bill or bills shall become due,
 “ the party to whom the said bill or bills are made payable, his
 “ servant, agent, or assigns, may and shall cause the said bill or
 “ bills to be protested by a notary publick, and in default of such
 “ notary publick, by any other substantial person of the city,
 “ town, or place, in the presence of two or more credible wit-
 “ nesses; refusal or neglect being first made of due payment of
 “ the same; which protest shall be made and written under a fair
 “ written copy of the said bill of exchange, in the words or form
 “ following:—*Know all men, that I A. B. on the*
 “ *day of* *at the usual place of abode of the said*
 “ *have demanded payment of the bill, of which the above is the copy,*
 “ *which the said* *did not pay; wherefore I the said*
 “ *do hereby protest the said bill, dated at* *this* *day*
 “ *of* Which protest, so made as aforesaid, shall within
 “ 14 days after making thereof be sent, or otherwise due notice
 “ shall be given thereof to the party from whom the said bill or
 “ bills were received, who is, upon producing such protest, to
 “ repay the said bill or bills, together with all interest and charges
 “ from the day such bill or bills were protested, for which protest
 “ shall be paid a sum, not exceeding the sum of six-pence; and
 “ in default or neglect of such protest made and sent, or due no-
 “ tice given within the days before limited, the person so failing
 “ or neglecting thereof, is and shall be liable to all costs, damages,
 “ and interest, which do and shall accrue thereby.

“ Provided nevertheless, that in case any such inland bill or
 “ bills of exchange shall happen to be lost or miscarried within
 “ the time before limited for payment of the same, then the
 “ drawer of the said bill or bills is and shall be obliged to give
 “ another bill or bills of the same tenor with those first given, the
 “ person or persons to whom they are and shall be so delivered,
 “ giving security, if demanded, to the said drawer, to indemnify
 “ him against all persons whatsoever, in case the said bill or bills
 “ of exchange, so alleged to be lost or miscarried, shall be found
 “ again.”

But this statute was deficient, in that it had no effect, unless the
 party, on whom the bill was drawn, accepted it, by underwriting
 the same, which few or none cared to do.

To remedy which, by the 3 & 4 Ann. c. 9. it is enacted,
 “ That in case, upon presenting any such bill or bills of exchange,
 “ the party or parties, on whom the said bills shall be drawn, shall
 “ refuse to accept the same by underwriting the same as aforesaid,
 “ the party to whom the said bill or bills are made payable, his ser-
 “ vant, agent, or assigns, may and shall cause the said bill or bills
 “ to be protested for non-acceptance, as in case of foreign bills of
 “ exchange; any thing in the said act, or any other law to the
 “ contrary notwithstanding, for which protest there shall be paid
 “ 2 s. and no more.

“ Provided, that no acceptance of any such inland bill of ex-
 “ change shall be sufficient to charge any person whatsoever,
 “ unless

“ unless the same be underwritten or indorsed in writing thereupon;
 “ and if such bill be not accepted by such underwriting or indorse-
 “ ment in writing, no drawer of any such inland bill shall be liable
 “ to pay any costs, damages, or interest thereupon, unless such
 “ protest be made for non-acceptance thereof, and within 14 days
 “ after such protest, the same be sent, or otherwise notice thereof
 “ be given to the party from whom the bill was received, or left
 “ in writing at the place of his or her usual abode; and if such
 “ bill be accepted, and not paid before the expiration of three
 “ days after the said bill shall become due and payable, then no
 “ drawer of such bill shall be compellable to pay any costs, da-
 “ mages, or interest thereupon, unless a protest be made and
 “ sent, or notice thereof be given in manner and form above men-
 “ tioned; nevertheless, every drawer of such bill shall be liable
 “ to make payment of costs, damages, and interest upon such
 “ inland bill, if any one protest be made for non-acceptance or
 “ non-payment thereof, or notice thereof be sent, given, or left
 “ as aforesaid.

“ Provided, that no such protest shall be necessary, either for
 “ non-acceptance or non-payment of any inland bill of exchange,
 “ unless the value be acknowledged and expressed on such bill to
 “ be received; and unless such bill be drawn for the payment of
 “ 20 *l.* or upwards, and that the protest, hereby required for non-
 “ acceptance, shall be made by such persons as are appointed by
 “ the above statute 9 & 10 *W.* 3. *c.* 17.

“ And it is further enacted by the said statute 3 & 4 *Ann.*
 “ *c.* 9. that if any person doth accept any such bill of exchange,
 “ for and in satisfaction of any former debt or sum of money
 “ formerly due to him, the same shall be accounted and esteemed
 “ a full and complete payment of such debt; if such person, ac-
 “ cepting of any such bill for his debt, doth not take his due
 “ course to obtain payment thereof, by endeavouring to get the
 “ same accepted and paid, and make his protest as aforesaid,
 “ either for non-acceptance or non-payment thereof.

“ Provided, that nothing herein contained shall extend to dis-
 “ charge any remedy that any person may have against the
 “ drawer, acceptor, or indorser of such bill.”

3. Of Promissory and Negotiable Notes.

The increase of trade, and necessity of paper credit, put bankers
 and others upon an expedient of bringing promissory notes within
 the custom of merchants, and making them negotiable, as inland
 bills of exchange; but this the judges would not admit of, pro-
 missory notes being only considered, by the common law, as
 evidences of a debt, and not assignable or negotiable in their own
 nature.

But it being found necessary to make use of this kind of credit,
 by the (a) 3 & 4 *Ann.* *c.* 9. reciting, that whereas it hath been
 held, that notes in writing signed by the party who makes the

Salk. 24.
 pl. 8. 129.
 pl. 12.
 2 *Ld.* Raym.
 757.
 6 *Mod.* 29.

(a) Made
 perpetual by
 the 7 *Ann.*
c. 25. § 3.

same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsible over within the custom of merchants to any other person; and that such person, to whom the sum of money mentioned in such note is payable, cannot maintain an action, by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note should be assigned, indorsed, or made payable, could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same; therefore to the intent to encourage trade and commerce, which will be much advanced, if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner, it is enacted, " That all notes in writing, that shall be made and signed
 " by any person or persons, body politick or corporate, or by the
 " servant or agent of any corporation, banker, goldsmith, mer-
 " chant, or trader, who is usually intrusted by him, her, or them,
 " to sign such promissory notes for him, her, or them, whereby
 " such person or persons, body politick and corporate, his, her, or
 " their servant or agent as aforesaid, doth, do, or shall promise to pay
 " to any other person or persons, body politick and corporate, his,
 " her, or their order, or unto bearer, any sum of money men-
 " tioned in such note, shall be taken and construed to be, by virtue
 " thereof, due and payable to any such person or persons, body
 " politick and corporate, to whom the same is made payable; and
 " also every such note payable to any person or persons, body po-
 " litick and corporate, his, her, or their order, shall be assignable
 " or indorsible over, in the same manner as inland bills of ex-
 " change are or may be according to the custom of merchants;
 " and that the person or persons, body politick and corporate, to
 " whom such sum of money is or shall be by such note made pay-
 " able, shall and may maintain an action for the same in such
 " manner as he, she, or they might do upon an inland bill of ex-
 " change, made or drawn according to the custom of merchants,
 " against the person or persons, body politick and corporate, who,
 " or whose servant or agent, as aforesaid, signed the same; and
 " that any person or persons, body politick and corporate, to
 " whom such note that is payable to any person or persons, body
 " politick and corporate, his, her, or their order, is indorsed or
 " assigned, or the money therein mentioned, ordered to be paid
 " by indorsement thereon, shall and may maintain his, her, or
 " their action for such sum of money, either against the person
 " or persons, body politick and corporate, who, or whose ser-
 " vant or agent as aforesaid, signed such note, or against any of
 " the persons that indorsed the same, in like manner as in
 " case of inland bills of exchange; and in every such action,
 " the plaintiff or plaintiffs shall recover his, her, or their da-
 " mages and costs of suit; and if such plaintiff or plaintiffs
 " shall be nonsuited, or a verdict be given against him, her, or
 " them, the defendant or defendants shall recover his, her, or
 " their

“ their costs against the plaintiff or plaintiffs; and every such plaintiff or plaintiffs, defendant or defendants respectively recovering, may sue out execution for such damages and costs by *capias, fieri facias, or elegit.*”

And it is further enacted by the said statute, “ That all and every such actions shall be commenced, sued, and brought within such time, as is appointed for commencing or suing actions upon the case, by the statute 21 *Jac.* 1. c. 16. § 3. of *Limitations.*

“ Provided, that no body politick or corporate shall have power, by virtue of this act, to issue or give out any notes by themselves or their servants, other than such as they might have issued, if this act had never been made.”

It hath been adjudged, that a note written by the plaintiff, and subscribed by the defendant, is a note *made and signed* by the defendant within this act; for the signing or subscribing is the lien, and the writing or making is only the mechanical part of it.

Trin.
6 Ann.
Atk v. Barron, in B.R.

[A promissory note, in its original form of a promise from one man to pay a sum of money to another, bears no resemblance to a bill of exchange. When it is indorsed, the resemblance begins, for then it is an order by the indorser to the maker of the note, who, by his promise, is his debtor, to pay the money to the indorsee. This is the exact definition of a bill of exchange.

Per Lord Mansfield, in *Heylin v. Adamson*, 2 Burr. 676.

The indorser of the note corresponds to the drawer of the bill; the maker to the drawee or acceptor; and the indorsee to the payee, or party to whom the bill is made payable.

When this point of resemblance is once fixed, the law is fully settled to be exactly the same in bills of exchange and promissory notes: and as some confusion has arisen in the books from an inattention to the real analogy between them, it may be proper to observe, that whenever the law is reported to have been settled with respect to the acceptor of a bill, it is to be considered as applicable to the drawer, or, as he may, with more propriety, be called, the maker of a note; when with respect to the drawer of a bill, then to the first indorser of the note: the subsequent indorsers and indorsees bear an exact resemblance to one another.

Till the twenty-third of *George III.* these notes and bills were written on a plain piece of paper unstamped: by a statute made in that year, certain duties were imposed on every piece of vellum, parchment, or paper, on which bills and notes, falling under certain descriptions, should be written, engrossed, or printed. By a subsequent act these duties are taken off, and others imposed in their stead.

Wde 23 Geo. 3. c. 49.
31 Geo. 3. c. 25. § 1.

By this latter statute, the duties on inland bills and notes vary according to the different classes into which they are distributed, by the provisions of the same statute.

One distinction is marked between those in which the sum expressed does *not* exceed 200*l.*, and those in which it *exceeds* that sum.

Of those in which the sum does *not* exceed 200 *l.* there are two general divisions; those payable on *demand*, and those payable *otherwise* than on demand.

Of those payable on *demand* a distinction is made between bills of exchange, drafts, or orders, for the payment of money on *demand*, and *promissory* notes, or *other* notes for the payment of money to the *bearer* on *demand*.

Vide § 7, 8, 9. The latter kind may be re-issued without being subject to the duty a second time; and the holder has the same remedy for the recovery of the sum expressed in them, after their being re-issued, as he would have had at first. But of these there are two classes—those which may be re-issued from time to time, after payment at the place *where they were first issued*; and those which may be re-issued from time to time, after payment *at the same place, or any other place*, than where they were first issued. The first may be for sums not exceeding 200 *l.*, the second for sums not exceeding 30 *l.*

Vide § 2. Duties on Bills of Exchange, Drafts, or Orders, for the Payment of Money on demand.

			s.	d.
For any sum amounting to 40 <i>s.</i> not exceeding	5 guineas	0	3	
— exceeding	5 guineas, — £. 30	-	0	6
— exceeding	£. 30 — 50	-	0	9
— exceeding	50 — 100	-	1	0
— exceeding	100 — 200	-	1	6
For any sum from	- 200 upwards	-	2	0

Duties on Bills of Exchange, Drafts, or Orders, payable *otherwise* than on demand, and Promissory Notes, or *other* Notes, payable *otherwise* than to the *bearer* on *demand*.

			s.	d.
For any sum amounting to 40 <i>s.</i> not exceeding	£. 30	-	0	6
— exceeding	£. 30 — 50	-	0	9
— exceeding	50 — 100	-	1	0
— exceeding	100 — 200	-	1	6
For any sum from	- 200 upwards	-	2	0

Duties on Promissory or *other* Notes payable to the *bearer* on *demand*, and re-issuable from time to time, after payment at the place where they were first issued.

			s.	d.
For sums amounting to 40 <i>s.</i> not exceeding	5 guineas	0	3	
— exceeding	5 guineas — £. 30	-	0	6
— exceeding	£. 30 — 50	-	0	9
— exceeding	50 — 100	-	1	0
— exceeding	100 — 200	-	1	6

Duties on Promissory Notes, or *other* Notes, for the payment of money to the *bearer* on *demand*, re-issuable from time to time after any payment at the *same* place, or any *other* place than where they were first issued.

With

With respect to Foreign Bills, drawn here in sets, according to the custom of merchants, every Bill of each set is subject to a stamp duty as under :

			s.	d.
For sums not exceeding £. 100	-	-	0	6
For sums exceeding - 100 not exceeding £. 200	-	-	0	9
	200	-	1	0

The duties are payable by the drawers or makers of the bills or notes respectively ; and the sheet or piece of vellum or parchment, or the sheet or piece of paper, on which the bills or notes are engrossed, written, or printed, must be stamped *before* these are drawn ; and the commissioners and their officers are prohibited from stamping any vellum, &c. at any time *after* any bill of exchange, promissory note, or other note, draft, or order, shall be engrossed, written, or printed thereon.

And it is enacted, that no bill of exchange, promissory note, or other note, draft, or order, liable to the duties, shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity, *unless* the vellum, &c. on which it shall be engrossed, printed, written, or made, shall be stamped with a lawful stamp to denote the rate or duty, or some higher rate or duty in the act contained.

It is likewise enacted, that if any bill, &c. for the payment of any sum amounting to 40 s. or upwards, be engrossed, &c. on vellum, &c. which shall not be stamped, &c., or which shall be stamped with a stamp of a lower denomination or value than by the act directed ; there shall be due, answered, and paid to his majesty, &c. the full rate or duty chargeable thereon, which shall be payable by and charged upon all and every person or persons, severally and respectively, who shall draw or make, and utter and negotiate, or cause to be drawn or made, and uttered and negotiated, any such bill, &c. on such vellum, &c. not stamped, or stamped with such lower duty, his, her, and their respective executors, administrators, and assigns.

And any person who shall write or sign, or cause to be written or signed ; or who shall accept or pay, or cause to be accepted or paid, any of these instruments, without the *proper* stamp, shall, for every offence, forfeit the sum of 20 l.

A penalty of 20 l. is also imposed on any person who shall re-issue any of the re-issuable promissory notes, otherwise than is permitted by the act.

These penalties may be sued for in any of the courts at Westminster, for offences committed in England ; and in the court of Exchequer in Scotland, for offences committed there, by action of debt, bill, plaint, or information, in which no essoin, privilege, wager of law, nor more than one imparlance shall be allowed.

And any justice of peace, residing near the place where the offence is committed, is authorized and required, on any information exhibited, or complaint made, to summon the party accused,

and the witnesses on either side; and, on due proof made, to give judgment for the penalty, and to issue his warrant for levying it on the goods of the offender; and unless they be redeemed within six days, to cause a sale to be made of the goods taken under the warrant, rendering to the party the overplus, if any; and if goods cannot be found sufficient to answer the penalty, to commit the offender to prison, there to remain for the space of three months, unless such pecuniary penalty shall be sooner paid and satisfied; but the justice may mitigate the penalty as he shall think fit, (reasonable costs and charges of the officers and informers, as well in making the discovery as in prosecuting the same, being always allowed, over and above such mitigation,) so as such mitigation do not reduce the penalty to less than a moiety over and above the said costs and charges—provided, that any one who shall feel himself aggrieved by the judgment of such justice, may, on giving security to the amount of such penalty, together with such costs as shall be awarded in case such judgment shall be affirmed, appeal to the next general quarter sessions for the county, riding, or place, which shall happen after 14 days next after such conviction shall have been made, and of which appeal reasonable notice shall be given, who are empowered to summon and examine witnesses upon oath, and finally to hear and determine the same; and if the judgment be affirmed, the court may award the offender to pay such costs, occasioned by such appeal, as to them shall seem meet.

§ 27. And if any one, being summoned to give evidence before such justice or justices, shall refuse to appear, without a reasonable excuse to be allowed by such justice or justices; or, appearing, shall refuse to give evidence, every such person shall forfeit the sum of 40 s. to be levied in the same manner as directed with respect to the other penalties.

§ 24, 25. The time limited for a common informer to sue in is three months, either in the superior courts or before justices of peace; and if a common informer sue within that time, the penalties are divided in moieties between the informer and the king.

§ 28. If no informer sue within that time, then the penalties are only recoverable in the name of his majesty's attorney general in *England*, or advocate in *Scotland*, by information in the respective courts; and the whole of the penalties go to the king.

§ 29. And if any person shall counterfeit, or procure to be counterfeited, any stamp directed to be used by this act; or shall counterfeit or resemble the impression of such stamp on any vellum, &c. or shall utter, vend, sell, or expose to sale, any vellum, &c. liable to the duties, with such counterfeit mark or impression, knowing the same to be counterfeited; or shall privately or fraudulently use any stamp or mark directed by this act to be used, with intent to defraud his majesty, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

§ 31. Drafts or orders for the payment of money to the bearer on demand, bearing date on or before the day on which the same are issued, and at the place from which the same are drawn and issued,

issued, and drawn on any banker or bankers, or person or persons acting as a banker or bankers, and residing and transacting the business of a banker within ten miles of the place where such draft or order shall be actually drawn and issued, are exempted from the duty.

And all promissory and other notes and bills issued by the Bank of England are exempted from any stamp duty, on consideration of the governors and company paying into the receipt of his majesty's Exchequer the annual sum of 12,000*l.* by half-yearly payments.

It is also provided, that nothing in the present act shall be construed to give legality to any bill of exchange or promissory note which was not legal before.]

2. What shall be said a Bill of Exchange, or Negotiable Note, within the Custom of Merchants.

As the custom of merchants hath established these bills and notes, so hath it prescribed their form, and required that the same should be in writing, and drawn by the party, or those having legal authority from him; and such drawing raises a contract to pay the money without any express promise.

As to the form of the bill, it is said, that the same strictness and nicety are not required in the penning of bills current between merchant and merchant, as in deeds, wills, &c.; on the other hand, it may happen, that a writing may have the form of a bill of exchange, and yet be otherwise.

As, if *A.* draw a bill upon *B.* in this form, *Sir, you are to pay S. S. so much of the money belonging to the governors and company of Devonshire miners, &c.*; this is no such bill of exchange as will entitle *S. S.* to an action against the drawer on the custom of merchants; for it is only a direction or appointment to the cashier to pay the money, and that out of a particular fund, and doth not answer the necessity of trade, not being a negotiable bill, or made indorsible over; and charging the drawer on such a note, would be liable to this further inconveniency, that hereby every one, who gives his steward an order or authority to pay money, might be charged for non-payment.

So, a bill drawn by *A.* upon *B.*, requiring him to pay *C.* 7*l.* every month out of the annuity, or growing fund of the drawer, is no bill of exchange, nor the drawee liable, though he accept such bill; for it concerns neither trade nor credit, but is to be paid out of the growing subsistence of the drawer; so that if the party die, or the fund be taken away, the payment is to cease and determine.

[The Earl of Delorane drew a bill on Brecknock, requesting him to pay to Miss Read, thirty-two pounds and seventeen shillings out of *W. Steward's* money, as soon as he should receive it; which bill Brecknock accepted generally.

Upon Brecknock's refusing to pay, an action was brought against the drawer as on a bill of exchange, but judgment was given

Carth. 510.
Salk. 128.
pl. 10.
Ld. Raym.
538. *Storky*
v. *Cheese-*
man.
10 Mod.
287. See
2 Ld. Raym.
1397.
Gilb. Cas.
94.
Pasch.
10 Geo.
Jenny v.
Herle, in
B. R. ad-
judged.
Stra. 591.
S. C. 2 Ld.
Raym. 1362.
S. C.
Pasch.
1 Geo. 1.
Josselyn v.
Lacier, in
B. R. ad-
judged.
Fortesc.
281. S. C.

Dawkes &
Ux. v. De-
lorane,
3 Will. 207.
2 Bl. Rep. 782.

against the plaintiff for this among other reasons, that it was payable out of a particular fund; and it being objected at the bar, that this bill was accepted by *Brecknock* generally, and in an unlimited manner; it was answered by the court, that if the bill had been drawn accordingly in a general and unlimited way, both the bill and the acceptance would have been good, but the acceptance here must mean that *Brecknock* accepts it to pay out of *Steward's* money, not out of the drawer's.

Banbury v. Lister, 2 Str. 1211. And on the same principle which governed these cases, an order from the owner of a ship to the freighter, to pay money *on account of freight*, has been held to be no bill of exchange.

Pierfon v. Dunlop, Dougl. 571. However, such a bill from the freighters of a ship to the person to whom the freight is due, if good in other respects, would certainly not be bad because it was made payable *on account of freight*, because indisputably there is a *personal* credit given to the drawer, the words *on account of freight* only expressing the consideration for which the bill was given.

M^rLeod v. Snee, 2 Ld. Raym. 1481 2 Str. 762. Bar. nard. 12. K. B. And there may be cases where the instrument may appear at first sight to be payable out of a particular fund, and in reality be otherwise, of which description the following case is one:—*A. B.* drew a bill of exchange, dated 25th of *May*, by which he requested *M^rLeod* “one month after date, to pay to *Snee*, or order, 9 l. 10 s. “as his quarterly half-pay, to become due from the 24th of *June* “to the 29th of *September* next by advance.” *M^rLeod* accepted it, and on his refusal to pay, was sued in the Common Pleas, where judgment being given against him, he brought a writ of error in the King's Bench, and objected to the judgment that this case resembled the former cases, being payable out of a particular fund; but the court held that this bill was drawn on the particular credit of the drawer, not on that of the half-pay, for it was to be paid as soon as the quarter began, and whether that should ever become due or not; and the mention of the quarterly half-pay was only a direction how the drawee was to reimburse himself.

Burchell v. Slocock, 2 Ld. Raym. 1545. Of the distinction taken between bills and notes in this respect, the following is an illustration:—“I promise to pay to *William Burchell*, the sum of 101 l. 12 s. three months after date, for “value received out of the premises in *Rosemary-lane*, late in the “possession of *Thomas Rower Sherwin*.” was held a good note under the statute.

3 Will. 213. 1 Burr. 325. But a bill or note must be absolutely payable at all events, and not depend on any particular circumstance which may or may not happen in the common course of things.

Haydock v. Lynch, 2 Ld. Raym. 1563. *Thomas Rogers* made a bill of exchange, by which he requested *Roger Lynch* to pay to *Henry Haydock*, or order, the sum of 14 l. 13 s. out of a fifth payment, when it should become due: this was held not to be a good bill of exchange, on account of the uncertainty whether any fifth payment might ever become due, as well as on account of its being payable out of a particular fund.

Kingston v. Long, B. R. M. 25 Geo. 3. So, an order to pay money, “provided the terms mentioned in “certain letters written by the drawer were complied with,” is not a good bill, though the acceptance admit a compliance with these

those terms, for it was no bill until after such compliance, and if it was not a bill when drawn, it could never afterwards become one.

Bayley, Appendix, No. 2.

Its uncertainty in this respect was one reason of the determination in the case of *Dawkes* against *Delorane*, it being an order to pay out of *Steward's* money, when received, which might never happen.

Supra, 695.

So, a note "to pay a certain sum of money, or to render the body of *J. S.* to prison by such a day," is not a note on which an action will lie by the statute, after failure of rendering the body to prison, because it was not necessarily and originally for payment of money, but only became so by matter *ex post facto*.

Smith v. Boheme, cited 2 Ld. Raym. 1362. 1396.

So, neither is a note "promising to pay money, if another do not pay it within a limited time;" for this is only an eventual promise.]

363. 4 Vin. 240. pl. 16. Appleby v. Biddulph, cited 3 Mod. 242. Comb. 227. S. C. Pearson v. Garrett. [Beard-erley v. Baldwin, 2 Str. 1151. S. P.]

Also it hath been resolved, that if *A.* give a note to *B.* for the payment of a sum of money when he the said *A.* should marry such a one; *B.* cannot bring an action on such note, and declare as on a bill of exchange, setting forth the custom of merchants, &c., for that in truth there is no such custom, being only an agreement founded on a marriage-broking, and to pay money on a collateral contingency; which contingency cannot be called trading, so as to come within the custom of merchants.

[So, a note "promising to pay to *A. B.* a sum of money, value received, on the death of a particular person, *provided* he leave me a sufficient sum to pay the same, *or if* I shall be otherwise able to pay it," is not good within the statute, because it is not absolutely payable at all events, but depends on two contingencies, neither of which may ever happen.

Roberts v. Peake, 1 Burr. 323.

In the case of notes, however, it is not necessary that the time of payment should be absolutely fixed; it is sufficient if, from the nature of the thing, the time must certainly arrive on which their payment is to depend.

Thus, a note "to pay to *A.* or order, six weeks after the death of the defendant's father, for value received," was held to be negotiable within the statute, for there was no contingency by which it might never become payable, but it was only uncertain as to the time, which, it was said, was the case of all bills payable after sight.

Cooke v. Colehan, 1 Str. 1217.

So, a note "payable to an infant, when he the infant should come of age," and specifying the time when that was to be, *viz.* "on the 12th June 1750," was held to be negotiable within the statute, for it would have been clearly good, if it had been made payable on the 12th of June 1750, which is a day certain, without mentioning that the plaintiff was then to come of age, and it is not the less certain from the addition of that circumstance.

Per Lord Mansfield. Goss v. Nelson, 1 Burr. 227.

Thus, "a promise to pay within two months after such a ship shall be paid off," will make a good note: for the paying off of the ship is a thing of a publick nature, and morally certain. [*Qu. If a private ship?*]

Andrews v. Franklin, 1 Str. 24.

So, "I promise to pay to *George Pratt*, or order, 8*l.* on the receipt of his the said *George Pratt's* wages, due from his majesty's

Evans v. Underwood, 1 Wils. 262, 263.

"majesty's ship the *Suffolk*, it being in full for his wages, and prize money, and short allowance money for the said ship," was held a good note on the authority of the last case; and there being an averment that the wages were received, the plaintiff recovered.]

Patch. But it hath been held, that a note drawn in these words, *I promise to account with J. S. or his order, for 50 l. value received by me, &c.* is a good negotiable note, within the statute 3 & 4 Ann. c. 9., and that the word *account* shall be construed the same as to pay, and not to render an account as factor or bailiff; and the rather, because he is not only accountable to J. S., but likewise to his order; which he cannot be as factor or bailiff, and therefore it must be to pay the money to the indorsee, or order of J. S.

Chadwick v. Allen, 1 Str. 766. [Neither will the addition of extraneous circumstances vitiate a note. Thus, "I do acknowledge that Sir *Andrew Chadwick* has delivered me all the bonds and notes for which 400 l. were paid him on account of Colonel *Synge*, and that Sir *Andrew* delivered me Major *Graham's* receipt and bill on me for 10 l., which 10 l. and 15 l. 5 s. balance due to Sir *Andrew*, I am still indebted for, and do promise to pay;" is good.

The words "value received," being in general inserted in bills and notes, there seems to have been some doubt, whether they were essential: in one case, where the want of these words was objected, a verdict was given on that account against the instrument, but that case seems to be of very doubtful authority: in a subsequent case the same objection was made, but as the instrument was clearly defective on another ground, the court gave no opinion as to this point.

On several occasions it appears to have been said incidentally by the court, and at the bar, that these words are unnecessary.

Fort. 282. 1 Show. 5. 497. 2 Ld. Raym. 1556. 1481. Lutw. 889. 1 Mod. Ent. 310.

And the point is now fully settled, that they are not necessary; for as these instruments are always presumed to have been made on a valuable consideration, words which import no more cannot be essential.

Whether it be essential to the constitution of a bill of exchange, that it should contain words which render it negotiable, as "to order," or "to bearer," seems not, hitherto, to have received a direct judicial decision. There are two cases in which the want of such words was taken as an exception, but as there were other objections on which the bill was in both cases held to be bad, it was not thought necessary to decide on that point.

In another case the same exception was taken and over-ruled, but under such circumstances as that the point was not generally determined. The defendant had given the plaintiff a draught on one *Heddy*, for the payment of a sum of money for work done by the plaintiff for the defendant: the plaintiff had neglected to demand payment for a considerable time after the draught was due; and in the mean time *Heddy* became insolvent. The plaintiff brought

Banbury v. Lister, 2 Str. 1212.
Dawkes v. Delorane, 3 Will. 207.

White v. Ledwick, B. R. H. 25 Geo. 3.
Bayley, Appendix, N. 3.

Banbury v. Lister, 2 Str. 1212.
Dawkes v. Delorane, 2 Will. 212.
Chamberlyne v. Delarive, 2 Will. 353.

brought his action for work and labour, and the defendant at the trial proved his having given this draught to the plaintiff in payment. But not being payable to the plaintiff or order, the jury considered it as not being a bill of exchange, and gave a verdict for the plaintiff. On an application for a new trial, the court thought it unnecessary to decide on the general question, whether words importing negotiability were essential to the constitution of a bill of exchange, because they were of opinion that by accepting the draught, and keeping it so long after it became payable, the plaintiff had given credit to *Heddy*, and discharged the defendant.

Yet it has been ruled that such words are not necessary in notes, and that the person to whom they are made payable may maintain an action on them, within the statute, against the maker. And there are several cases in the books of reports where such words were omitted, and no exception taken on that account. The reason of this indulgence to notes may be, that they have less reference to trade and distant commerce, being properly no more than engagements between party and party; and the statute being remedial, the benefit of it has been extended beyond the literal words.

*Per Lord
Hardwicke,
Moore v.
Paine,
Ca. temp.
Hardw. 288.*

It must also be observed, that in most of the cases where the several instruments have been denied the privilege of bills and notes, it is not, for that reason, to be concluded that they are of no force: when the fund from which they are to be paid, can be proved to have been productive, or the contingency on which they depend has happened, they may be used as evidence of a contract, according to the circumstances of the case, or according to the relation in which the parties stand to one another.

William Watts, a merchant, who traded to *Gibraltar*, employed *Moses Massias* as his factor there, who used to consign *Watts's* goods to certain agents in *Barbary* for sale. *Massias* used to keep an account with the agents, and another with *Watts*, but *Watts* had no communication with the agents. On the 21st of *May* 1772, *Watts* drew a bill in the following terms, for the balance of an account that day stated between him and *Maber* and *Kentish*, merchants, with whom he had dealings:

*Maber v.
Massias,
Bl. Rep.
1072.*

"Sir, please to pay to Messrs. *Maber* and *Kentish*, or order, 195 l. 14s. 10d. out of the produce of goods you have of mine, now lying at *Gibraltar*, *Barbary*, and *Leghorn*, as soon as the same shall come into your hands, after discharging the present acceptances.

"To Mr. *Moses Massias*,
"No. 63, *Prescot-street*."

"WILLIAM WATTS."

Which bill *Massias* accepted in the following words underwritten,
"I agree to conform to this order, MOSES MASSIAS."

Before this bill was paid, *Watts* became a bankrupt, and *Massias* refusing payment, an action was brought against him for "money had and received to the use of the plaintiff." On the trial it appeared, that *Massias* had large quantities of goods of *Watts* in his hands in 1773, to the amount of 1657 l. and more in 1772.
That

That he had paid large sums for *Watts*, but whether for engagements prior to 1772, or not, did not appear.

The defendant gave evidence of several prior engagements, but these did not cover the whole account; and also that there was, at the time of acceptance, and still remained, a balance due to *Massias* himself of 870*l.* There was a verdict for the plaintiff; and an application being made by the defendant for a new trial, the court observed that the question was, Whether the defendant had in his hands 195*l.* for the use of the plaintiff? He was proved to have had goods to the amount of 1657*l.*, and that his acceptances, in the common and technical sense of the words, as applied to bills of exchange, together with certain other indorsements by which he had engaged himself to pay money for *Watts*, left a balance in his hands more than sufficient to pay the plaintiffs; if the balance of 870*l.* due to *Massias* himself, be excluded. For this balance, then unliquidated, it never could have been meant to provide, nor was it meant that the bill or its acceptance should be subject to it, for then there would have been fraud in the drawer, and also in the acceptor; both knew, or must be supposed to have known, at least *Massias* knew, how the balance then stood. If he meant to have reserved his own balance, he should have made a special acceptance; but having accepted it generally in the terms of the draft, subject only to prior acceptances, he shall not shelter himself by this concealed balance due to himself in the course of a running account.

Vide Pre-
amble to st.
15 Geo. 3.
c. 51.

It having been found by experience, that trade and commerce suffered materially from the circulation of bills, notes, and drafts for very small sums, which passed as cash, and many of them being made payable under certain terms and restrictions with which the poorer sort of manufacturers, artificers, labourers, and others could not comply, without subjecting themselves to great extortion and abuse, the legislature has thought proper to lay certain restraints on bills or notes under a limited sum.

15 Geo. 3.
c. 51. § 8.

All notes and bills for the payment of any sum under twenty shillings, which had been issued *before* the 24th of *June* 1775, were made payable on demand.

§ 1.

§ 2.

Notes and bills for less than twenty shillings, issued *after* the 24th of *June* 1775, are declared void. And any person publishing or uttering such bills or notes, or in any manner engaged in the negotiation of them, is liable to a penalty of not more than 20*l.* nor less than 5*l.*, to be recovered and applied in the manner pointed out by the act, which was to continue for five years.

§ 13.

17 Geo. 3.
c. 30.

The good effects of this act being found, further provisions for the same purpose were made by another two years after.

§ 1.

All promissory or other notes, bills of exchange, or drafts, or undertakings in writing, being negotiable or transferable, for the payment of 20*s.*, or for any sum of money above that sum and less than 5*l.*, or on which 20*s.*, or above that sum, and less than 5*l.*, shall remain undischarged, issued after the first of *January* 1778, shall specify the names and places of abode of the persons respectively to whom or to whose order they shall be made payable;

able; shall bear date before or at the time of drawing or issuing them, and not on any subsequent day; shall be made payable within the space of twenty-one days next after the day of the date; and shall not be transferable or negotiable after the time limited for the payment: and every indorsement shall be made before the expiration of that time, and bear date at or before the time of making it, and shall specify the name and place of abode of the person or persons to whom or to whose order the money is to be paid: and the signing of every such note, &c., and also every indorsement, shall be attested by one subscribing witness at the least; and all notes, &c. of the above description not having these requisites shall be utterly void.

The same penalties, recoverable in the same way as in the former act, are imposed on every one uttering, publishing, or negotiating such notes, &c. without the requisites prescribed. § 2.

And all negotiable notes, &c. issued before the 1st of January, for any sum between the sum of 20 s. and 5 l., or on which 20 s. or less than 5 l. remained undischarged, are made payable on demand. § 3.

And this act and the former act are continued not only for the residue of the five years of the former, but also for other five years. § 4.

And by a subsequent statute, both the former are made perpetual.] 27 Geo. 3. c. 16.

It hath been resolved, that a bill of exchange drawn by a gentleman, who is no trader, shall notwithstanding make him responsible within the custom of merchants; for otherwise persons of distinction travelling abroad would suffer in their credit; and it might bring a general inconveniency on trade itself, when it came to be known to foreign merchants, that there were some who, though they took upon themselves to draw bills of exchange, yet were not liable to the payment thereof. Carth. 82. Show. 125. Witherley v. Sarsfield, Comb. 45. 152. S. C. ill reported.

3. Who shall be said liable to the Payment thereof; and therein of suing the Drawer, Indorfor, or Acceptor.

It is clear, that (a) every drawer of a bill is liable to the payment thereof, as is every (b) acceptor and indorfor: also, (c) if there are several indorsors of the same bill, the last indorsee may bring his action against the first indorfor, or any of them; for the indorsement is *quasi* a new bill, or at least a warranty, as some books express it, by the indorfor, that the bill shall be paid. (a) That if several drawers subscribe, all are liable. Molloy, 278. (b) And having once accepted it, Stra. 479.

cannot afterwards revoke it. Molloy, 283. (c) Skin. 343. pl. 11. Ld. Raym. 181.

So, if a bill be drawn upon A., and he accept it, and afterwards refuse payment, upon which the bill is protested, the person to whom it is payable may bring several actions against the acceptor and the drawer; for the protest is no discharge of the acceptor. Molloy, 273.

But though the drawer, acceptor, and indorfor, are all liable, yet the party can have but one satisfaction: but, until such satisfaction 3 Mod. 86. Lutw. 88c. 882. Sk. 255. pl. 3.

Co. 4. 32.
S. C.
Claxton
v. Swift.

faction is actually had, he may sue all, or any of them; and accordingly it was adjudged in the Exchequer-chamber, where the case was, An indorsee sued the drawer, and had judgment against him; and he also brought an action against the indorfor, to which the indorfor pleaded the judgment against the drawer, but the plea was held ill; for that the judgment was no satisfaction, without which the party could not be barred of the remedy which he had against the other.

[Neither is the engagement of an indorfor discharged by an ineffectual execution against the drawer, or any prior or subsequent indorfor.

Hayling v.
Mulhall,
2 Bl. Rep.
1235.

A bill was indorsed by *Sheridan*, and afterwards by one *Boon*, and came into the hands of *Hayling*, who sued *Boon*, and took him in execution, and afterwards let him out on a letter of licence without paying the debt. He then sued *Sheridan*, and held him to bail: *Sheridan* not paying the bill, *Hayling* brought a third action against *Mulhall*, one of the bail, who insisted that the debt was satisfied by the imprisonment of *Boon*. But it was observed by the court, that each indorfor is independent of the rest, and that the bill-holder had a right to sue all the indorsors till the bill was satisfied: the law indeed so highly regards the liberty of the subject, that the taking of his body in execution is, with respect to him, a full satisfaction of the debt. But it only operates as a discharge to the identical person so imprisoned; it does not discharge even his goods after his death, since the statute of *James the First*. The remedy still remains, after the death or discharge, against every other indorfor.]

Molloy,
281. 285.
(a) So, if
one sub-
scribe for
the honour
of him who
subscribes
for the ho-
nour of the
drawer.
Carth. 129.
Lut. 196.

And not only the drawer, acceptor, and indorfor are liable, but also by the custom of merchants, if one merchant draw a bill which is protested, and another hearing thereof declare that he, for the honour of the (a) drawer, will pay the contents; and thereupon subscribes in these or the like words, *I the underwritten do bind myself as principal, according to the custom of merchants, for the sum mentioned in the bill of exchange, whereupon this protest is made, &c.*, this shall as effectually bind him, as if he had been the original drawer; and by this the person to whom the bill is payable hath his remedy, both against such person, as surety, and also against the principal. But the principal, or original drawer, is liable to him who thus subscribes for his honour.

10 Mod. 36,
37.

If *A.* draw a bill on *B.*, who has effects of his in his hands, and *B.* accept the bill, which is afterwards protested for non-payment, and the bill be afterwards indorsed to *A.* the drawer, he may maintain an action as indorfor against *B.*; but if there had been no effects of *A.*'s in the hands of *B.*, so that the acceptance was only for the honour of *A.* the drawer, he could have no action; for thereby the money would be recovered only to be repaid again.

Salk. 126.
pl. 6. cont.
Salk. 133.
pl. 10.

It hath been held by some opinions, that though an indorfor be liable, that yet, in an action against him, it must be alleged in the declaration, that the money was demanded of the drawer, he being
the

the principal debtor, and the indorfor only a surety, warranting payment in case the drawer made default: but the better opinion seems to be, that this is not material, every indorfor being to be considered as making a new bill, or note, on whose credit alone perhaps the money was given, and the drawer not at all known to the indorsee. It seems, however, to be more advisable to give it in evidence, that there was a demand on the drawer, or an endeavour to find him out; but this also hath been thought by (a) some not to be necessary.

(a) The Chief Justices Holt, Raymond, and Eyre, held, that a demand on the drawer was requisite to be given in evidence, the indorfor's

engagement being only conditional.—But Parker, Pratt, and King, held it not to be necessary; said by Lord Hardwicke, Mich. 10 Geo. 2. to have been so ruled by them at the Sittings; and of the latter opinion he seemed to be himself; and held it clearly, not to be necessary to allege it in pleading. [And it is now settled, that to entitle the indorsee to recover against the indorfor of an inland bill of exchange, it is not necessary to demand the money of the first drawer. *Heylin v. Adamson*, 2 Burr. 669.]

4. Who shall be said entitled to the Money.

The money is to be paid to him in whose favour the bill is drawn, or to the indorsee, in case it be indorsed over; of which indorsement it seems the drawer, acceptor, and drawee must take notice at their peril; also, if there are several indorsors and indorsee, the last indorsee is entitled to the money.

Carth. 130.

If a bill of exchange is made payable to *A.*, who indorses it to *B.*, who indorses it to *C.*, and it is protested for non-payment; *B.* may bring an action on this bill, notwithstanding his indorsement.

Show. 163.
Dekers v. Harriat.

If *A.* draw a bill of exchange, payable to *B.*, for the use of *C.*, and *B.* for valuable consideration indorse it over to *D.*, *D.* may bring an action against *A.* the drawer; and he cannot plead that the money was extended in his hands at the suit of the king, for a debt due from *C.*, for *C.* being only *cestui que trust*, had only an equitable interest, and no (b) legal remedy for the money; and *B.* is only responsible in equity to *C.* for the breach of trust.

Carth. 5.
Skin. 264.
pl. 2.
Show. 5.
S. C. Evans v. Cramlington, adjudged, and affirmed in the Exchequer-chamber.

2 Vent. 309. *S. C.* adjudged; it appearing that the bill was indorsed before any seizure, or writ of extent issued out, and that an indorsement on such bill was good by the custom of merchants. (b) So, in debt on a single bill made to *A.* to the use of him and *B.*, the defendant pleads a release made to him by *B.*, and on demurrer it was adjudged for the plaintiff without difficulty; for *B.* is no party to the debt, and therefore can neither sue nor release it; but it is an equitable trust for him, and sueable in the Chancery, if *A.* will not let him have part of the money; and the book of *E. 4.* cited, that he might release in such case, was denied to be law. *Lev. 235. Offy v. Ward.*

Of the Indorsement.

Indorsement is a term known in law, which, by the custom of merchants, transfers the property of the bill or note to the indorsee; and is usually made on the back of the bill, and must be in writing; but the law hath not appropriated any set (c) form of words, as necessary to this ceremony; and therefore it hath been held, that if a man write on the back of a bill of exchange, *This is to be paid to J. S.*, or, *The content of this bill is to be paid to J. S.*, and set his hand to it, this is a good indorsement.

Molloy, 281.
7 Mod. 86,
87. (c) An indorsement set forth in these words, *indorsavit super billam illam content. billæ illius solvend. is*

sufficient after verdict, without shewing that it was subscribed. *Salk. 130. pl. 14.* The bare indorsement of a name transfers no property, and though it may be filled up at any time before the note is given

given in evidence, yet that has been denied *after*. Theo. Evid. 84. 2 Str. 1103. *contr.* [But a blank indorsement will transfer the property, and is more frequent than an indorsement in full. Its effect is, to render the bill or note afterwards transferable by delivery only as if it were payable to bearer, for by only writing his name, the indorser shews his intention that the instrument should have a general currency, and be transferred by every possessor. Dougl. 633. 639.]

Salk. 126.
pl. 4. Clerk
v. Pigot.
Molloy, 28 r.
S. P. and
said to be an
usual prac-
tice among
merchants.
[Hence, a
man to
whom a bill
was deliver-
ed with a
blank in-
dorsement,

So, if *A.* having a bill of exchange, writes his name on the back of it, and sends it to *J. S.* his friend, to get it accepted, which is done accordingly; *A.* notwithstanding his name, may bring an action against the acceptor; although objected, that the property was transferred to *J. S.*, for *J. S.* had it in his power, either to act as servant or assignee; and if he had filled up the blank space, making the bill payable to him, that would have witnessed his election to have received it as indorsee; but that being omitted, his intention is presumed to act only as servant to *A.*, whose name he would use only in order to write the acquit-
tance over it.

and who carried it for acceptance, was admitted, in an action of trover for the bill against the drawee, to prove the delivery of it to the latter. Lucas v. Haynes, 1 Salk. 130. 2 Ld. Raym. 871.]

Salk. 130.
pl. 16.
Comb. 401.
Carth. 493.
Fisher v.
Pomfret.

A bill payable to a man's order is payable to himself, and he may bring an action thereon, averring that he made no order, &c.

So, where a bill of exchange was indorsed in this manner, *Pay the contents of this bill unto the order of J. S.*, who brought his action as indorsee, averring he had made no order to any body to receive the money; and on demurrer, it was urged, that *J. S.* could not maintain an action, because the indorsement was not to him, but to his order: the court held the action well brought against the indorser; and that among tradesmen, this form of indorsement is commonly used, although it is intended to be made payable to the person whose order is mentioned.

Salk. 125.
pl. 2.
3 Lev. 299.
Salk. 133.
Skin. 343.
pl. 11.
Comb. 204.
466.
[(a) It is ab-
surd to in-
dorse them:
they pass
merely by
transfer. *Vide infra*.]

As to the indorsing of bills, a difference has been taken between a bill payable to *J. S.* or bearer, and *J. S.* or order; that the first is not assignable by the contract, so as to enable the indorsee (*a*) to bring an action, if the drawer refuse to pay; because there is no such authority given to the party by the first contract; and the effect of it is only to discharge the drawee, if he pays it to the bearer, though he comes to it by trover, theft, or otherwise; but when the bill is payable to *J. S.* or order, there, an express power is given to the party to assign, and the indorsee may maintain an action.

Salk. 125.
pl. 2. 133.
Skin. 343.
pl. 11. 411.

Also, though an assignment of a bill, payable to *J. S.* or bearer, be no good assignment to charge the drawer with an action on the bill, yet it is a good bill between the indorser and indorsee, and the indorser is liable to an action for the money; for the indorsement is in nature of a new bill.

Salk. 125.
pl. 2.
3 Lev. 299.

So, it hath been adjudged, that an indorsee of a bill, payable to *J. S.* or bearer, may maintain an action against the drawer; on alleging a special custom, that such bill should bind him; which custom is so found or confessed by the defendant.

Also,

Also, in cases of bills purchased at a discount, there is said to be this difference, that if it be a bill payable to *A.* or bearer, it is an absolute purchase; but if to *A.* or order, and it is indorser blank, and filled up with an assignment, the indorser must warrant it as much as if there had been no discount. Salk. 128.

A bank bill payable to *A.* or bearer, being given to *A.* and lost, was found by a stranger, who transferred it to *C.* for a valuable consideration; *C.* got a new bill in his own name; and *per Holt*, Ch. J.; *A.* may have trover against the stranger who found the bill, for he had no title; though payment to him would have indemnified the bank; but *A.* cannot maintain trover against *C.* by reason of the course of trade, which creates a property in the assignee, or bearer. Salk. 126. Pl. 5.

[A bank note for 21 l. 10 s. payable to one *William Finney*, or bearer, on demand, was sent by *Finney* under cover by the general post to his correspondent in *Oxfordshire*; the mail on the same night was robbed, and this note among others taken and carried away by the robber; it afterwards came into the possession of one *Miller*, an innkeeper, for a full and valuable consideration, in the usual course of his business, without any notice or knowledge of its having been taken out of the mail. *Finney*, hearing of the robbery, applied to the bank to stop the payment of this note, which was ordered, on his entering into security to indemnify the bank: *Miller* afterwards presented the note for payment, and delivered it to *Race*, a clerk of the bank, who refused either to pay it, or redeliver it. *Miller* brought an action of trover against *Race*, for the recovery of the note; and a case stating these circumstances coming before the court, it was held, that the plaintiff was entitled to recover; because there appeared no circumstance of collusion in him; he had taken the note in the usual course of his business, for a valuable consideration, and the currency of these notes and the nature of trade required that the fair holder should be protected even against the true owner, who could only recover them back from the finder, or any other person who had given no value for them. Miller v. Race, 1 Burr. 452.

Vaughan, a merchant in *London*, gave to *Bicknell*, one of his ships husbands, a draft on his banker, *Sir Charles Asgill*, payable to ship *Fortune*, or bearer: *Bicknell* lost the draft: the person who found it, or at least was in possession, however he might have obtained that possession, went four days after the note was payable, to the shop of *Grant*, a tradesman at *Portsmouth*, and having bought some tea, gave him the note in payment, and desired to have the balance. *Grant* stepped out to make inquiry who *Vaughan* might be, and being informed he was a responsible man, and that the note was in his hand-writing, gave the change out of the note, retaining the price of the tea. *Vaughan* being apprised that *Bicknell* had lost the note, sent notice to *Sir Charles Asgill* not to pay it. Payment being accordingly refused, *Grant* brought his action against *Vaughan* as the drawer. The cause was tried by a special jury of merchants, who found for the defendant. On an application for a new trial, the court held, that these notes were transferable by mere delivery, and however the true owner may Grant v. Vaughan, 3 Burr. 1516. 1 Bl. Rep. 485.

have lost them, the fair possessor for a valuable consideration was entitled to the money, and therefore granted a new trial.

The same principle applies to the case of a bill negotiated with a blank indorsement.

Peacock v.
Rhodes et
al. Dougl.
613.

A bill was drawn at *Halifax*, by *Rhodes* and another, on *Smith, Payne, and Smith*, bankers in *London*, payable to *William Ingham*, or order, thirty-one days after date, for value received. *Ingham* indorsed it in blank; *John Daltry* received it from him, and indorsed it in the same manner, and delivered it to *Joseph Fisher*; it was stolen from *Fisher* at *York*, without any indorsement by him: *Peacock*, a mercer at *Scarborough*, afterwards received it from a man unknown, who called himself *William Brown*, and by that name indorsed it to *Peacock*, of whom he bought cloth and other articles in the way of his trade as a mercer, and gave him that bill in payment, receiving the balance in cash and small bills: it appeared, that *Peacock* did not know the drawers, but had, several times before that, received bills drawn by them, which were duly paid. *Peacock* tendered this bill for acceptance and payment to the drawees, who refused; on which he brought an action as the indorsee of *Ingham* against the drawers. A verdict by consent was found for the plaintiff, subject to the opinion of the court of King's Bench, on a special case stating the preceding facts. The court held, that there was no difference between a bill or note indorsed blank, and one payable to bearer. They both pass by delivery, and possession proves property in both cases. The holder of either cannot with propriety be considered as assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject: if this rule were applied to bills and notes, it would stop their currency; it would render it necessary for every indorsee to inquire into all the circumstances, and the manner in which the bill came to the indorser: but the law is now clearly settled, that a holder coming fairly by a bill or note, is not to be affected with the transaction between the original parties, except in such cases as depend on particular acts of parliament.

But a transfer by indorsement, where that is necessary, can only be made by him who has a right to make it, and that is strictly only the payee, or the person to whom he or his indorsee has transferred it, or some one claiming in the right of some of these parties.

Where a bill or note is drawn in favour of two or more in partnership with one another, an indorsement by one will bind both, if the instrument concern their joint trade: so, where it is in favour of them or either of them, an indorsement by one is a sufficient transfer, though they be not in partnership.

Carvick v.
Vickery,
Dougl. 653.
in the notes.

So, where a bill drawn by two is made payable to them or their order, it would seem from principle that either might transfer without the other; for when two persons join in the same bill, they hold themselves out to the world as partners, and, for that purpose are to be treated as such; and when a bill goes out into the world, the persons to whom it is negotiated are to collect the state and relation of the parties from the bill itself. If they appear on

the bill as partners, it may be of less public detriment to subject them to the inconvenience of being treated as such, than to permit them to deny that they are so. But there is an universal usage among all the bankers and merchants in *London*, that in such a case, an indorsement by one of the payees only is void.]

A note payable to a feme sole, or order, who afterwards marries, can only be indorsed by the husband.

10 Mod.
246. Str.
516. Theo. Evid. 81.

[If a man become bankrupt, the property of bills and notes of which he is the payee or indorsee, vests in his assignees, and the right to transfer is in them. And if in fact he indorse a bill or note after his bankruptcy, and that be discovered before it be paid, the assignees may recover it back from his indorsee in an action of trover; and if the money be received, they may recover the money in an action for so much money paid to their use.

Beaves,
469, 470.

If he die, it devolves to his personal representatives, his executors, or administrators; and they may indorse it, and their indorsee maintain an action, in the same manner as if the indorsement had been by the testator or intestate. But on their indorsement they are liable personally to the subsequent parties, and not as executors; for they cannot charge the effects of the testator.

Rawlinson
v. Stone,
3 Will. 1.
2 Str. 1260.
2 Barnes,
137. cited
2 Burr.
1225.

1 Term Rep. 487.

They may also be the *indorsees* of a bill or note in their quality of executors or administrators; as, where they receive one from their testator or intestate, and in that character they may bring an action on it against the acceptor or any of the other parties.]

King, Ex.
v. Thorn,
1 Term
Rep. 487.
Vide also
10 Mod. 315.

It hath been adjudged, that a bill of exchange, or promissory note, cannot be indorsed over for part, so as to subject the party to several actions; as, if *A.* having a bill of exchange upon *B.* indorses part of it to *J. S.*, *J. S.* cannot bring an action for his part, although he allege a custom among merchants for such kind of indorsements; for the contract being entire, and subjecting him only to one man's action, no custom can make him liable to two or more actions for the same debt.

Carth. 466.
Hawkins
v. Cardy,
Salk. 65.
pl. 2. S. C.
where it is
said, that
the plaintiff
should have
acknow-

ledged satisfaction for the rest.

[A bill or note may be indorsed at any time after it has issued, even after the day of payment. However, the indorsement of a note after it is due, throws a degree of suspicion upon it, and in an action against the maker by the indorsee, the former is in such case entitled to go into evidence to shew, that the note has been paid as between him and the indorser.

1 Ld. Raym.
575.
3 Term
Rep. 80.

In an action by an indorsee of a promissory note, payable on demand, against the maker, the defendant was admitted to give evidence, that the note had been indorsed to the plaintiff a year and a half afterwards; and to impeach the consideration, by shewing that it had originally been given for smuggled goods; and that payments had been made upon it at several times. There was no privy brought home to the plaintiff, but Mr. *J. Buller* was of opinion, that he ought to be nonsuited; for he said, it had been repeatedly ruled at *Guildhall*, that wherever it appears, that a bill or note has been indorsed over some time after it is due, which is out of the usual course of trade, that circumstance throws such a

Banks v.
Colwell,
at Launce-
ston Spring
Assizes,
1788.

suspicion on it, that the indorsee must take it on the credit of the indorser, and must stand in the situation of the person to whom it was payable; and here, the consideration was illegal. He therefore nonsuited the plaintiff.

Taylor v.
Mather,
East. 27 G.
3. B. R.
3 Term
Rep. 83.
note.

In an action by an indorsee of a promissory note against the maker, it appeared, that the note was indorsed some time after it was due, and there were many circumstances which led the court and jury to conclude that it was fraudulently obtained; whereupon a verdict was found for the defendant. Upon a motion for a new trial, it was refused on the merits, and *Buller J.*, at the same time said, it has never been determined, that a bill or note is not negotiable after it becomes due; but if there are any circumstances of fraud, and it comes into the hands of a plaintiff by indorsement after it is due, I have always left it to the jury upon the slightest circumstance to presume, that the indorsee was acquainted with the fraud. The rest of the court concurred in this opinion.

Brown v.
Davies,
3 Term
Rep. 80.

In an action by an indorsee of a promissory note against the maker, the plaintiff rested his case upon the proof of the maker's and payee's hand-writing. The note appeared on the face of it to have been drawn on the 6th of *October* 1788, payable to *Sandal* or order, and to have become due on the 13th of *November*: it had *Sandal's* indorsement upon it, and had been noted for non-payment. Whereupon the defendant's counsel offered to prove these facts; that *Sandal*, having indorsed it in blank, delivered it to *Taddy*, by whom it had been noted for non-payment. That on the 6th of *December*, *Sandal*, having been paid by the defendant, the maker of the note, took it up from *Taddy*, and afterwards, without the knowledge or consent of the defendant, negotiated it to the plaintiff. But Lord *Kenyon*, being of opinion that, unless knowledge was brought home to this plaintiff, it would make no difference between these parties, rejected the evidence, and the plaintiff had a verdict. Upon a motion for a new trial, his Lordship concurred with the rest of the court in granting it, confining himself however to this ground, that the note appeared to be noted for non-payment at the time the plaintiff received it.

It is no objection to the claim of an indorsee, that the indorsement to him does not contain the words "to order."

More v.
Manning,
Comyns,
311. in C.B.
Hil. 6 G. 1.
cited 2 Burr.
1222.

Manning had given a promissory note to *Statham* or order; *Statham* assigned it to *Witherhead*, and *Witherhead* to *More*, who, on non-payment at the time, brought an action against *Manning*: on a demurrer to the declaration, exception was taken, that the assignment to *Witherhead* was made without saying to him or order, and that therefore he could not assign it over to *More*. But it was held by the whole court, that the indorsement was sufficient; for if the original note be assignable, then, to whomsoever it may be assigned, he has the whole interest in it, and may assign it as he pleases; an assignment to him comprehends his assigns.

Acheson v.
Fountain,
Mich. 9 G.
1. B. R.
1 Str. 457.

In another case the plaintiff had declared on an indorsement made by *William Abercrombie*, by which he appointed the payment to be to *Louisa Acheson*, "or order;" on the bill being produced in evidence, it appeared to be originally made payable to *Abercrombie*,

Crombie, or order, but *Abercrombie's* indorsement was only this. cited 2 Burr. 1223.
 " Pray pay the contents to *Louisa Achefon*." It was objected, " that the indorsement did not agree with the declaration." The court however gave judgment, on the ground of a general proposition in law, that a bill is negotiable without the addition of those words to the indorsement; the legal import of such indorsement being, that the bill was payable to order, and that the plaintiff might on this have indorsed it over to another, who would have been the proper order of the first indorser.

Colonel *Clive* drew a bill, payable to Mr. *Cambell*, or order, on the *East-India* Company, who accepted it; Mr. *Cambell* indorsed it to Mr. *Robert Ogilby*, but the words " or order" being originally omitted, were afterwards inserted by another hand before the trial: *Ogilby* indorsed it over to Messrs. *Edie* and *Laird*, or order, and afterwards, before the payment, became insolvent: *Edie* and *Laird* brought an action against the Company as acceptors, who refused payment, on pretence that *Ogilby* had no right to assign to the plaintiffs: the real question was, Who should bear the loss, Mr. *Cambell* or the plaintiffs? for the *East-India* Company if they did not pay to the plaintiffs, must pay to Mr. *Cambell*. The court were clearly of opinion, that the plaintiffs had a right to recover; that the law was settled by the two last cases; that such an indorsement as that to *Ogilby* was good, and gave the indorsee a right of indorsing over.

Yet an indorsement may be restrictive, and then it operates to preclude the person to whom it is made from transferring the instrument to another, so as to give him a right of action, either against the person imposing the restriction, or against any of the preceding parties; it may give a bare authority to the indorsee to receive the money for the indorser; as if to say, " Pray pay the money to such a one for my use," or use such other expressions as necessarily import that he does not mean to transfer his interest in the bill or note, but merely to give a power of receiving the money. In such a case it would be clear that no valuable consideration had been paid; but the intention of restraint must appear on the face of the indorsement.

So, if the payee direct by indorsement, that " the within must be credited to the account of a third person " This is not a transfer of the bill to that third person, but only an authority to the drawees to give him credit for so much; the payee does not mean to make himself liable as indorser, or to enable the other to raise money on the bill.

And, if in such a case the drawee accept the bill, instead of cancelling it, and an indorsement be forged and the bill negotiated, the party who shall advance money on it must sustain the loss; and if afterwards a friend of the drawer, by mistake, pay the bill for his honour, the drawer may recover back the money, in an action for money had and received to his use; for it was the duty of the party advancing the money on the bill to read the special indorsement, and he must suffer for his negligence.

Ancher v.
Bank of
England,
Doug. 637.

Thus, where a bill was drawn by a house in *Denmark* on a house in *London*, payable to a person residing in *Denmark*, or his order, and the payee made such a special indorsement; the drawees accepted and gave notice to the drawers and to the person in whose favour the indorsement was made, that they had received the bill, and placed it to the account of the latter; the clerk of the acceptors forged an indorsement to himself, or order, from the person to whose account the money was to be credited, and discounted it at the bank; the acceptors failed before the day of payment, and a friend of the drawers went to the bank and paid the bill for their honour: the drawers afterwards recovered back the money from the bank, on the ground that this special indorsement restrained the negotiability of the bill, and that the money was paid by mistake.

An indorsement may be made on a blank note, before the insertion of any date or sum of money, in which case, the indorser is liable for any sum, at any time of payment that may afterwards be inserted; and it is immaterial whether the person taking the note on the credit of the indorsement knew whether it was made before the drawing of the note or not; for in such a case the indorsement is equivalent to a letter of credit for any indefinite sum.

Russel v.
Langstaffe,
Doug. 514.

One *Galley* having had frequent money transactions with *Russel* a banker, and having overdrawn his cash account, *Russel* suspecting his credit, refused to advance him any more money, without the addition of the name of some indorser of whom he should approve: on this *Galley* applied to *Langstaffe*, who indorsed his name on five copperplate checks, made in the form of promissory notes, but in blank, that is, without any sum, date, or time of payment, mentioned in the body of the notes. *Galley* afterwards filled up the blanks with different sums and dates, and *Russel* discounted the notes. *Galley* became a bankrupt, and *Russel* demanded payment of *Langstaffe*, and, on his refusal, brought an action, in which the court thought he was entitled to recover, though it appeared that he knew the notes were blank at the time of the indorsement.

Bank of
England v.
Newman,
1 Ld. Raym.
442.
12 Mod. 241.

It is said, that on a transfer by delivery, the person making it ceases to be a party to the bill or note; that such a transfer is a sale, and that he who sells it, does not become a new security, and is not liable to refund the money if the bill should not be paid.

Lambert v. Pack, 1 Salk. 128. 7th resolution.

Kyd on Bills
of Exch. 90.

But this can only be true to its full extent when applied to the case of a demand by a subsequent party, when one or more have intervened between him and the party against whom he makes the demand: as between the immediate parties to the transfer, this distinction must be taken, that when the bill or note has been given in payment of a precedent debt, or for a valuable consideration at the time of the transfer, without being discounted; then, though the person who has given the money for the bill or note cannot recover against the person who received it, as indorser, yet he

he may certainly recover in an action for money had and received for his use, as the transferer must be understood to undertake that the bill shall be duly paid. But if the bill or note be *discounted* for the accommodation of the transferer, then the transfer is a sale, and the doctrine here laid down will apply.]

6. Of the Acceptance: *And herein,*

1. *What shall be said a good Acceptance.*

It hath been already observed, that an acceptance, by the custom of merchants, as effectually binds the acceptor, as if he had been the original drawer; and that having once accepted it, he cannot afterwards revoke it; so that herein only we are to see, what act of his will amount to an acceptance.

Cro. Jac.
30^s.
Hard. 4^e 7.

And herein it is said, that a very small matter will amount to an acceptance; and that any words will be sufficient for that purpose, which shew the party's assent or agreement to pay the bill; as, if, upon the tender thereof to him, he subscribes, *accepted*; or, *accepted by me A. B.*; or, *I accept the bill, and will pay it according to the contents*; these clearly amount to an acceptance.

Molloy,
27^s.

So, if the party underwrites the bill presented such a day, or only the day of the month; this is such an acknowledgment of the bill as amounts to an acceptance.

Comb. 401.

So, if the party says, *Leave your bill with me, and I will accept it*; or, *Call for it to-morrow, and it shall be accepted*; these words, according to the custom of merchants, as effectually bind, as if he had actually signed or subscribed his name according to the usual manner.

Molloy,
28^s.

But if a man says, *Leave your bill with me, I will look over my accounts and books between the drawer and me, and call to-morrow, and accordingly the bill shall be accepted*; this does not amount to a complete acceptance; for the mention of his books and accounts shews plainly that he intended only to accept the bill, in case he had effects of the drawer's in his hands.

Molloy,
279, 280.
said to have
been ruled by
Hale, Ch. J.

But where the drawer wrote a letter to the person, in whose favour the bill was drawn, to this purport, *That if he would let him write to Ireland first, he would pay him*; this was held a good acceptance.

cor. Raymond, C. J. at *Nisi Prius*, 1 Ld. Raym 444.

Mich.
12 Geo. 1.
Wilkinson
v. Lutwich,
1 Stra. 64^s.

So, where a foreign bill was drawn on the defendant, and being returned for want of acceptance, defendant said, *That if the bill came back again, he would pay it*; this was ruled a good acceptance.

Mich. 6 G.
1. Car v.
Coleman,
in B. R.

It seems clear, that a parol acceptance is sufficient at common law to charge the acceptor; also it hath been adjudged, since the statute 3 & 4 Ann. c. 9. *supra*, that an indorsee of an inland bill of exchange may maintain an action against the acceptor, on a parol acceptance, as to the principal sum, though not as to interest and costs; for the act being made to give a further remedy, for interest, damages, and costs against the drawer, cannot be supposed to take any advantage from the payee which he had before;

Mich.
8 Geo. 2.
Lumley v.
Palmer, in
B. R. 2 Stra.
1000. S. C.
[See acc.
Julian v.
Shrobborne,
2 Will. 9.
In Pillans
v. Van

Mierop,
per Lord
Mansfield,
3 Burr.
1672.
Sproat v.
Mathews,

and therefore the true construction of the (a) act is, that to charge the drawer with interest and costs, the drawee must refuse to accept it in writing; nevertheless, if he accepts the bill by parol, he is liable to the principal sum in the bill, as he would have been before the act.

1 Term Rep. 182.] (a) So, on the statute of 9 and 10 W. 3. c. 17. which gives damages and costs, in case of a protest, it hath been held, that that statute did not take away the party's remedy against the drawer, if there was no protest, as to the principal sum, but only as to the damages and costs. 6 Mod. 80, 81. Salk. 131. pl. 17. Erough v. Perkins.

Moor v.
Withy, Tr.
10 Geo. 3.
B. R. Buil.
N. P. 270.

[A drawee of a bill underwrote it thus: "Mr. *Jackson*, please to pay this bill, and charge it to Mr. *Newton's* account." It was contended, that this was not an acceptance, for that the party did not mean to become the principal debtor. It was only a direction to *Jackson*, to pay out of a particular fund. But the court held, that the underwriting being a direction to pay the sum, it was of no importance to what account it was to be placed when paid: that was a transaction between the parties themselves, and this was a sufficient acceptance.

Powell v.
Monnier,
1 Atk. 611.

A bill was sent to the drawee for acceptance; he kept it for ten days before it became due without any objection; and whilst it continued in his hands, he entered it in his bill-book, under a particular number, and wrote the number on the bill, and at the bottom the day when it would become due, and then sent it back, refusing to accept it: it was proved, that it was the common practice of the drawee to enter and mark all bills in the same manner, whether he intended to accept them or not: the court seemed to think, that these circumstances alone did not amount to an acceptance.

Smith v.
Nislin,
1 Term
Rep. 269.

If a merchant be desired to accept a bill on the account of another, and to draw on a third, in order to reimburse himself, and in consequence he draw a bill on that third person; the bare act of drawing this bill will not amount to an acceptance of the other, for the party evidently shews he meant only to make himself liable, in case the bill drawn by him should be accepted and paid.

Beawes,
466.

An agreement to accept or honour a bill will, in many cases, be equivalent to an acceptance, and whether that agreement be merely verbal or in writing is immaterial: if *A.*, having given or intending to give credit to *B.*, write to *C.* to know whether he will accept such bills as shall be drawn on him on *B.'s* account, and *C.* return for answer that he will accept them; this is equivalent to an acceptance, and a subsequent prohibition to draw on him on *B.'s* account will be of no avail, if, in fact, previous to that prohibition, the credit has been given.

Pillans v.
Van Mierop,
3 Burr.
1663.

White, a merchant in *Ireland*, desired to draw on the plaintiffs, *Pillans* and *Rose*, merchants at *Rotterdam*, for 800*l.* payable to one *Chifford*, and proposed to give them credit on a good house in *London* for their reimbursement, or any other mode of reimbursement: the plaintiffs, in answer, desired a confirmed credit on a house of rank in *London*, as the condition of their accepting the bill: *White* named the house of the defendants as that house of rank:

rank : the plaintiffs honoured the draft, and paid the money, and then wrote to the defendants, *Van Mierop* and *Hopkins*, merchants in *London*, desiring to know whether they would accept such bills as the plaintiffs should in about a month's time draw on their house for 800 *l.* on the credit of *White* : the defendants agreed to honour the bill ; but, before it was drawn, *White* failed, and then the defendants wrote to the plaintiffs, informing them that *White* had stopped payment, and desiring them not to draw, as they could not accept their draft. The plaintiffs however drew, holding the defendants not at liberty to retract their engagement. And so held the court of King's Bench.

The mere answer of a merchant to the drawer that he will "duly honour his bill," is not of itself an acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement : but if there be any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer.

And an agreement to accept may be expressed in such terms as to put a third person in a better condition than the drawer. If one man, to give credit to another, make an absolute promise to accept his bill, the drawer, or any other person, may shew such promise on the exchange, to procure credit, and a third person advancing his money on it, has nothing to do with the equitable circumstances which may subsist between the drawer and acceptor.]

2. Whose Acceptance shall bind.

A bill drawn on two, must regularly have a joint acceptance ; but if there are two joint traders, and one accepts a bill drawn on both, for him and partner, this shall bind both, if it concerns the trade ; otherwise, if it concerns the acceptor only in a distinct interest and respect.

If a book-keeper or servant having authority, or usually transacting business of this nature for his master, accept a bill of exchange, this shall bind his master.

A bill of exchange was drawn by *A.*, agent to the *York-Buildings Company* in *Scotland*, on *B.* their cashier in *London*, in the words following : To *Cashier to the Honourable Governor and Assistants of the York-Buildings Company, at their house in Winchester-street* : Sir, Pray pay to *J. S.*, or his order, 200 *l.*, and place it to the account of the Company, for value received, as per advice from your humble servant. The letter of advice referred to was directed to the Governor and Company, informing them of the draught made upon *B.* in favour of *J. S.*, but it did not appear that this was the usual method of drawing bills on the Company : *B.* accepted the bill generally ; and this bill having been indorsed over, and an action thereon brought by the indorsee against *B.*, the question was, Whether this acceptance should charge him in his own right, or not ? And it was held, that it should ; this being in every respect a good bill of exchange, and only

Beawes,
454. *Pier-*
son v. Dun-
lop, Cowp.
572. 574.
1 Atk. 711.
Powell v.
Monnier.

Mason v.
Hunt,
Doug. 286.
299.

Molloy,
279. 284.
Salk. 126.
pl. 3. *Ld.*
Raym. 175.
Pinkney v.
Hall.

Molloy,
282. But
for this vide
tit. Master
and Servant.

Mich.
7 Geo. 2.
Thomas v.
Bishop, in
B. R.
2 Stra. 955.
S. C.
2 Kel. 136.
pl. 16. *S. C.*
2 *Barnard.*
K. B. 320.
S. C.

only the drawer, payee, and acceptor concerned in it, as far as appears on the face of the bill; for though it may be for the advantage of the Company, yet they are not liable to the payment of it; nor is the person in whose favour it was drawn, or the indorsee, obliged to take notice of such advantage, or of any transactions between them and their cashier, or how they stand liable to each; for were it allowed, that an indorsee must be put to seek a paymaster that bears no visible part in the transaction, this would be such a prejudice to trade, and paper-credit made so blind and hazardous a thing, that no man in his senses would ever be engaged in it: and as to the letter of advice, this was held to be only a private transaction between the drawer and a stranger; which it is not to be imagined the payee or indorsee could be privy to, and therefore cannot be any prejudice to them; nor a circumstance fit for the consideration of a jury, before whom nothing ought to be laid, in cases of this kind, but what all persons concerned in the transaction may be reasonably supposed to know; and those are, all things visible on the bill, but no circumstance extrinsecal to it.

3. *Whether an Acceptance may be qualified.*

Comb. 452.
Petit v.
Benfon.

It is held, that an acceptance may be qualified, as thus; I accept this bill, half to be paid in money, and half in bills; and this is good by the custom of merchants; for he, who may refuse the bill totally, may accept it in part; but he, to whom the bill is due, may refuse such acceptance, and protest it so as to charge the drawer. Also it is said, that after such acceptance and refusal of payment, he hath the same liberty of charging the drawer, which he had in case the bill had been accepted absolutely, and payment refused.

Molloy,
283.

So, the drawee may accept the bill, to pay it at a longer day than that on which it is made payable, and this shall bind him; but herein care must be taken, that the drawee, by such acceptance or agreement, be not a sufferer.

Molloy,
285. per
Pemberton,
Ch. J.

A bill was drawn payable the first of *January*; the person on whom the bill was drawn accepts the bill, to be paid the first of *March*; the servant brings back the bill; the master, perceiving this enlarged acceptance, strikes out the first of *March*, and puts in the first of *January*, and then sends the bill to be paid; the acceptor then refuses; whereupon the person, to whom the monies were to be paid, strikes out the first of *January*, and puts in the first of *March* again. In an action brought on this bill, the question was, Whether these alterations did not destroy the bill? and ruled it did not.

Carth. 459,
460. Salk.
127. pl. 8.
129. pl. 11.
Ld. Raym.
364.
Lutw. 233.

If *A.* draw a bill payable such a day, and the drawee accept it some time after, he is liable; and in an action against him the plaintiff may declare, that *secundum tenorem & effectum billæ* he did not pay, &c.; for the effect of the bill is the payment, and not the day of payment.

Jackson v. Pigot. See Comyns, 75. pl. 49. 12 Mod. 212. 410.

[The acceptance may direct the payment to be made at a place different from that mentioned in the bill, as, at the house of a banker; in which case, if the holder neglect to demand payment within a reasonable time, and the banker afterwards fail, he must stand to the loss.

Bishop v.
Chitty,
2 Str. 1195.

But if the banker continue solvent, the holder is not bound to prove a demand on the banker in an action against the acceptor.

Smith v.
De lafontaine, B. R.
Trin. 25 Geo. 3. Bayley App. No. 5.

An acceptance may also be "to pay when certain goods consigned to the acceptor, and for which the bill is drawn, shall be sold;" for it would affect trade if factors were not allowed to use this caution when bills are drawn on them, before they have an opportunity to dispose of the goods.

Smith v.
Abbot,
2 Str. 1152.

So, an acceptance "on account of the ship *Thetis* when in cash for the said vessel's cargo" is sufficient to bind the acceptor.

Julian v.
Shobrooke,
2 Will. 9.
Banbury
v. Lister,
2 Str. 1212.

On the same principle, an acceptance "to pay as remitted from the place where the person on whose account the acceptance is made resides," seems binding after the remittance made.

But what shall be considered as an absolute or conditional acceptance is a question of law to be determined by the court, and is not to be left to the jury.

1 Term
Rep. 182.

A bill was drawn in *New England* for a sum of money advanced there, for the repairs of a ship, of which *Lutwidge*, the drawee, residing at *Whitehaven*, was the freighter. *Wilkinson*, the holder of the bill, applied to a merchant in *London*, to send the bill to *Lutwidge* for acceptance: the merchant sent it inclosed to the drawee, who by letter acknowledged the receipt, and wrote thus: "The bill which you sent me I will pay, in case the owners of the *Queen Ann* do not; and they living in *Dublin*, I must first apply to them; I hope to have their answer in a week or ten days: I do not expect they will pay it, but I judge it proper to take their advice before I do, with which I request you will acquaint Mr. *Wilkinson*, and that he may rest satisfied of the payment." In another letter he wrote, "I have not had an opportunity of sending the bill to *Ireland*, but will take the first opportunity, and then will remit to the gentlemen concerned, according to my promise." The bill not being paid, an action was brought against *Lutwidge*, as acceptor, in which he insisted that these letters did not amount to an absolute acceptance, but were only conditional, to pay in case the owners of the *Queen Ann* did not; and that his promise to procure payment from them was in favour of the plaintiff; but the Chief Justice thought it was rather in favour of himself; that the letters were a complete acceptance, and amounted to this; that he wished the holder of the bill to give him time to write to *Ireland*, but assured him that at all events the money should be secured, whether the owners of the *Queen Ann* paid it or not.

Wilkinson
v. Lutwidge,
1 Str. 648.

Raymond.

A bill was drawn on *Mathews*, payable to one *Lenox*, or order, and by indorsement came into the hands of *Sproat*: *Sproat's* clerk presented the bill for acceptance to *Mathews*, who lived in *London*,

Sproat v:
Mathews,
1 Term
Rep. 182.

don,

don, and who told him, "that the drawer had consigned a ship " and cargo to him and another person in *Bristol*; but as he could " not tell whether the ship would arrive at *London* or *Bristol*, he " could not accept at that time:" the clerk, by the consent of *Mathew*, left the bill, and afterwards called, in company with his master, to know whether *Mathew* would accept the bill or not; who, on being pressed, declared "the bill was a good one, and " would be paid, even if the ship were lost."

The court held that this was only a conditional, not an absolute acceptance. *Mathew* had three events in contemplation; the arrival of the ship at *Bristol*, her arrival at *London*, or her being lost: if the ship arrived in *London*, the cargo being consigned to him, he would have effects to reimburse himself; if she were lost, he had the policy of insurance, by which he could indemnify himself by recovering against the underwriters; but if she arrived in *Bristol*, the cargo was consigned to another, he would have no effects: in either of the former events he meant to accept the bill; in the latter he did not.

Vide Dougl.
236.

If the acceptance be in writing, and the drawee intend that it should be only conditional, he must be careful to express the condition in writing as well as the acceptance; for if the acceptance should, on the face of it, appear to be absolute, he cannot take advantage of any verbal condition annexed to it, if the bill should be negotiated and come to the hands of a person unacquainted with the condition, and even against the person to whom the verbal condition was expressed, the burden of proof will be on the acceptor.

A conditional acceptance, when the conditions on which it depends are performed, becomes absolute.

Pierfon v.
Dunlop,
Cowp. 571.

Nichol was the captain of a ship of which *Pierfon* was the owner. The ship was freighted with naval stores by *M^cLintot*, who, being unable to discharge the freight, drew a bill on *Dunlop* and Co. payable fifteen days after sight to the order of *Nichol*, and gave *Nichol* a certificate or navy bill, assigned to *Dunlop* and Co. as a security till the bill of exchange should be accepted: *Nichol* indorsed the bill, and sent it to *Pierfon*, together with a letter from *M^cLintot* to *Dunlop* and Co. in which was inclosed the certificate which *M^cLintot* desired them to tender at the Navy-office, and at the same time he advised them, that he had drawn on them as above. On the 2d of October 1776, *Pierfon* sent this letter, with the certificate inclosed, and also the bill of exchange, to *Dunlop* and Co.; when the bill was demanded again the next day, the defendants delivered it up, saying, "it would not be accepted " till the navy bill was paid;" but they refused to deliver the navy bill, saying, they would receive the money themselves. It was held, that this was a conditional acceptance, which, on the receipt of the money, became absolute. *Nichol*, the captain, had a lien on the naval stores for his freight; the certificate was a security for that freight; it was given into his possession as a pledge for the money till the bill should be paid. It was not sent to *Dunlop* and Co. by the post in the usual course, but was inclosed

to *Pierfon* as his security. He was therefore not bound to part with it till the bill was accepted. *Dunlop* and Co. by detaining it, and saying that the bill would not be accepted till the navy bill should be paid, undertook, on that event, to accept and pay the bill of exchange.

But if the conditions, on which the agreement to accept a bill is made, be not complied with, that agreement will be discharged.

As, if a merchant undertake to accept bills to a certain amount, on condition that a cargo of an equal value be consigned to him, and an order given for insurance; if the cargo consigned do not equal the value, he is not bound to accept. Mason v. Hunt, Dougl. 297.

When a bill is drawn for the account of a third person, and is accepted according to its tenor for his account, and he fails without making provision for its payment, the acceptor must discharge the bill, and can have no redress against the drawer. Beawes, 456.

But if the drawee do not choose to accept on the account of him for whose account he is advised the bill is drawn, he may accept for the account and honour of the drawer. Id. *ibid*.

Or, if a bill, made payable to order, be indorsed by a substantial man before acceptance be demanded, the drawee, if he have any doubt about the drawer, or of him on whose account it is drawn, may accept it for the honour of the indorser; but in this case he must first have a formal protest made for non-acceptance, and should send it without delay to the indorser for whose honour he has accepted it. Id. *ibid*.

Such acceptances as these are called acceptances *supra* protest; and have this effect with respect to the security of the acceptor, that they give him a right to call on the party for whose honour he accepts; and in the case of an acceptance for the honour of the indorser, on him and all the parties before him; whereas a simple acceptance, according to the tenor of the bill, gives him a remedy only against the drawer, or against him on whose account the bill is drawn, as the case may be. Id. 458.

The method of accepting *supra* protest is this; the acceptor must personally appear with witnesses before a notary, (whether the same who protested the bill or not, is of no importance,) and declare that he accepts such protested bill in honour of the drawer or indorser, &c. and that he will satisfy the same at the appointed time; and then he must subscribe the bill thus, "Accepted *supra* protest, in honour of T. B." &c.

But this acceptance *supra* protest may be so worded, that though it be intended for the honour of the drawer, yet it may equally bind the indorser, and in such a case it must be sent to the latter. Id. 457.

If the person on whom the bill is drawn refuse to accept it, any third person after protest for non-acceptance may accept *supra* protest for the honour of the bill or of the drawer, or of any particular indorser: if he accept for the honour of the bill or of the drawer, he is bound to all the indorsees as well as to the holder: Id. *ibid*.
if

if in honour of a particular indorfor, then to all subsequent indorsees.

Beawes,
457, 458.

Any one accepting a bill *supra* protest, though without the orders or knowledge of the person for whose honour he accepted it, has a remedy against that person, who is bound to satisfy him as if he had acted entirely by his directions, for his commission, postage, and other charges.

Id. 457.

If a bill be protested for non-acceptance, and after it has been accepted *supra* protest by a third person, the drawee, on receiving fresh advice and orders, determine to accept and pay it, the acceptor *supra* protest may permit him, though the holder cannot be obliged to free him from his acceptance; and if the two acceptors agree, the drawee must pay the other his commission, charges, &c. as it was by his acceptance that the bill was prevented from being returned protested.

Id. 458.

If the acceptor of a bill for the honour of the drawer or indorfor, receive his approbation of the acceptance, then he may safely pay the bill without any protest for non-payment. But if the person, for whose honour the bill was accepted, either return no answer to the advice, or express a disapprobation of the acceptance, then the acceptor *supra* protest must cause a formal protest to be drawn up for non-payment against him to whom the bill was directed, and on his continuing to refuse payment, must pay it for him.

Id. ibid.

When a bill is protested for non-payment, any man may pay it under protest, for the drawer's or indorfor's honour, even he who made or he who suffered the protest; but he must previously declare before a notary, for whose honour he discharges it; and of this the notary must give an account to the parties concerned, either jointly with the protest, or in a separate instrument.

Beawes,
459.

He who discharges a bill protested for non-payment, in honour of the drawer, has his remedy against the latter, but not against the indorsors; but he who discharges a bill protested for non-payment, in honour of an indorfor, has his remedy not only against that indorfor, but against all that were before him, including the drawer; but he has no right against subsequent indorsors.

Id. 458.

A man, after having given a simple acceptance to a bill, cannot satisfy it under protest, in honour of an indorfor, because as acceptor, he has already bound himself to that indorfor; but a drawee, not having yet accepted the bill, may discharge it for the honour of the indorfor or drawee, as if he were a third person unconcerned.

Id. ibid.

Yet it is said that the possessor of a bill, protested for non-payment, is not bound to admit of its discharge from a third person under protest, either in honour of the drawee or of any indorfor, unless he declare and prove that the honour of that bill was particularly recommended to him: and if the protested bill be indorsed by the possessor's correspondent, and were remitted by him, then, the possessor ought not to admit of any payment in honour

nour of the indorsements, but under the express condition, that the payer shall have no redress against the said correspondent.

4. Of the Effect of an Acceptance.

The effect of the acceptance is to give credit to the bill, and to render the acceptor liable according to the tenor of his acceptance; the very act of accepting implies an acknowledgment that he has effects of the drawer in his hands. *Id.* 455.

If therefore the drawee accept a bill generally, and by reason of his non-payment, the drawer is obliged to pay it, the latter, as drawer, may maintain an action against him, not only for the principal sum, but, in case of a protest, for damages, interest, and costs. *Symonds v. Parminter, 1 Will. 185.*

If indeed the drawee have no effects of the drawer in his hands, and notwithstanding accept the bill, he has his remedy, if he pay it, against the drawer; but with regard to every body besides, the acceptor is considered as the original debtor, and to be entitled to have recourse against him, it is not necessary for the holder to shew notice given to him of non-payment by any other person. *Dougl. 249.*

When a bill is once accepted absolutely, it cannot in any case be revoked, and the acceptor is at all events bound, though he hear of the drawer's having failed the next moment, even if the failure was before the acceptance. *Mar. 17: Beawes, 454.*

But the acceptor may be discharged by an express declaration of the holder, or by something equivalent to such declaration.

Black held, as indorsee, a bill drawn by one *Dallas*, and accepted by *Peele*. *Black* arrested *Peele*, but finding that no consideration had been given for the acceptance, his attorney took security from *Dallas*, and sent word to *Peele*, "that he had settled with *Dallas*, and he needed not to trouble himself any further." *Dallas* afterwards became bankrupt, and then *Black* demanded payment of *Peele*. The cause was tried first before Lord *Mansfield*, and afterwards by Chief Justice *De Grey*, who both held, that the acceptor was discharged. *Black v. Peele, cited Dougl. 49.*

In another case a book of the plaintiff's was produced in which the bill was entered, and over against it this memorial, "Mr. *Pulteney's* acceptance annulled." The jury, however, gave a verdict for the plaintiff; but the court of Exchequer granted a new trial, on the ground that this was an implied discharge; and on the second trial before Chief Baron *Skinner*, one *Alexander*, who had indorsed the bill to the plaintiff, was produced as a witness on the part of the defendant, and swore that *Walpole* had positively agreed to consider *Pulteney's* acceptance as at an end; on which the jury found for the defendant. *Walpole* had kept the bill from 1772 to 1775 without calling on *Pulteney*. *Walpole v. Pulteney, cited Dougl. 249.*

But no circumstances of indulgence shewn to the acceptor by the holder, nor any attempt by him to recover of the drawer, will amount to an express declaration of discharge.

Dingwall
v. Dunster,
Doug. 247.

Dunster accepted a bill merely to lend his credit, and to accommodate *Wheate*, the drawer. *Fitzgerald*, the payee, indorsed it to *Dingwall*, and delivered it to him in payment for jewels. After it became due, the plaintiff, understanding that the acceptor never had any consideration for it, and that *Wheate* was the real debtor, wrote to one *Ready*, *Wheate's* attorney, on the 6th of *February*, and on the 4th of *November* 1775, pressing him for payment. *Dunster*, on the 13th of *February* 1775, wrote a letter to *Dingwall*, thanking him in strong terms for not proceeding against him, but mentioning in the same letter, that he had been informed by a person who had been sent from him to *Dingwall* on the business, that *Wheate* had taken up the bill, and given another to *Dingwall's* satisfaction. It did not appear that *Dingwall* took any notice of that letter. But he for some time received interest on the bill from *Wheate*, and also the principal due by another bill, made at the same time, and drawn and accepted by the same parties, and under like circumstances. The plaintiff suffered several years to elapse without calling on *Dunster*, or treating him as his debtor. The question was, Whether the plaintiff, by his conduct, had discharged the acceptor? and the court unanimously held, that he had done nothing from which it could be concluded he meant to abandon his claim against him. He had done right in applying to *Wheate* for payment, as he was apprised that he was in fact the debtor, and *Dunster* was so far sensible of his kindness, as to thank him for his indulgence in a letter; had the suggestion in that letter been true, relative to the plaintiff's having delivered up the bill to *Wheate*, that might have made a material difference: but the plaintiff having returned no answer to the letter, and the fact not having been attempted to be proved at the trial, it was probable the assertion was not warranted. This case had no resemblance to the two preceding cases which had been cited in argument.

Neither will any length of time short of the statute of limitations, nor the receipt of part of the money from the drawer or indorser, nor a promise by indorsement on the bill by the drawer to pay the residue, discharge the holder's remedy against the acceptor.

Ellis v.
Galindo,
Doug. 250.
in the notes.

A bill was drawn by one brother and accepted by another. When it became due, the payee received of the drawer 3*l.* 15*s.* 4*d.* and at the same time the following indorsement was made on the bill: "Received on account of this bill 3*l.* 15*s.* 4*d.*." "Balance remaining due 26*l.* 4*s.* 8*d.* I promise to pay Mr. *Thomas Ellis*, "within three months from the date of this." Signed by *James Galindo*, who was the drawer. The balance was never paid, and at the distance of three years an action was brought against the acceptor; the cause was tried before Lord *Mansfield*, who thought the acceptor was discharged, and nonsuited the plaintiff. The ground of his Lordship's opinion probably was, that the indorsement was as a new bill accepted by the plaintiff in payment of the old; and on an application for a new trial, his Lordship said, he did not think that this case at all interfered with the determination

ation in *Dingwall* and *Dunster*. The plaintiff's counsel contended that the indorsement was made to prevent an imputation of neglect, because delay in coming against an acceptor may discharge a drawer or indorser. The court all seemed to think that this was a question of intention, and ought therefore to have been left to the jury, but they refused a new trial on account of the smallness of the sum.

But, when the holder of a bill receives part of the money from the drawer, he cannot recover more than the residue from the acceptor; and where the drawer pays the whole, the acceptor is completely discharged.

By the law of *Leghorn*, if a bill had been accepted and the drawer had failed, and the acceptor had not sufficient effects of the drawer in his hands at the time of acceptance, the acceptance became void. This happening to be the case of one *Burrowes*, he instituted a suit at *Leghorn*, to discharge himself of his acceptance, which was accordingly vacated by a sentence in the court there. He afterwards returned to *England*, and was sued here on his acceptance; on which he filed a bill in Chancery for an injunction and relief. Lord Chancery *King* was clearly of opinion, that this cause was to be determined according to the laws of the place where the bill was negotiated; and the acceptance having been vacated by a competent jurisdiction, that sentence was conclusive, and bound the court here.

If the drawee offer a conditional acceptance, and the holder, instead of acquiescing, do something which shews that he does not admit such acceptance, the drawee is not bound, even if the event afterwards happen on which the acceptance was to depend.

A bill payable to one *Lenox*, or order, forty days after sight, was drawn on the defendant; *Lenox* indorsed it to the plaintiff: *Allen*, the plaintiff's clerk, presented the bill to the defendant, who lived in *London*, for acceptance: the defendant told him that the drawer had consigned a ship and cargo to him and another person at *Bristol*, but as he could not then tell whether the ship would arrive at *London* or *Bristol*, he could not accept at that time: on which *Allen* said that he would leave the bill upon this condition, that in the event of the defendant's not accepting it as from the day when it was presented, he should be at liberty to note it for non-acceptance as from that time: to this the defendant assented, and the bill was accordingly left at his house till a future day, when *Allen* called again, in company with the plaintiff, to know whether the defendant would accept the bill or not, who, on being pressed to accept it, said that the bill was a good one, and would be paid, even if the ship were lost. *Allen* immediately on this carried the bill to a notary publick, and had it noted for non-acceptance from the time when it was first left with the defendant. The ship afterwards arrived safe at the port of *London*, and the defendant disposed of the cargo. This being a conditional acceptance, the conduct of the plaintiff was held to have been a

Bacon v.
Searles,
1 H. Bl.
Rep. C. B.
88.

Burrowes
v. Jemino,
2 Str. 733.

Sproat v.
Mathews,
1 Term
Rep. 182.

waiver of it, and to have precluded him from holding the defendant to his engagement.

Though an agreement to accept, on condition of a certain fund being consigned to the acceptor for the discharge of the bill, may amount to an acceptance on the performance of the conditions, yet, if the indorsee take the fund out of the hands of the drawee, he discharges him from his engagement.

Mason v.
Hunt,
Dougl. 284.
297.

Rowland Hunt, in *Dominica*, agreed with a house there, that his partner, *Thomas Hunt*, in *London*, should, on a cargo of tobacco being consigned to him, with the bills of lading, and an order for insurance, accept such bills as that house should draw on him, at the rate of 80 *l.* per hhd., from ninety days to six months sight: insurance for the sum of 3600 *l.* was ordered on forty hhds. of tobacco, which *Thomas Hunt* procured for a premium of 303 *l.* He afterwards received a letter, advising him of six bills of exchange being drawn on him for 3200 *l.*, in consequence of *Rowland Hunt's* agreement, payable to one of the partners of the house, on account of forty hhds. of tobacco, and indorsed by him to *Mason*. The bills arrived, and were presented for acceptance. *Thomas Hunt* refused to accept them, on an apprehension that the tobacco was not worth the money at which it was valued. After a negotiation of some days, *Mason* took the bill of lading for the forty hhds. and the policy of insurance out of the hands of *Thomas Hunt*. The tobacco afterwards arriving, was received and sold by the plaintiff *Mason*, and produced only 1400 *l.* The occasion of this difference between the real produce and the valued price did not appear. Under the direction of Lord *Mansfield*, a verdict was given for the defendant; and on an application for a new trial, his Lordship expressed himself thus:—An agreement to accept, may in many instances amount to an acceptance: but an agreement is still but an agreement, and if it be conditional, and a third person, knowing of the conditions annexed to the agreement, take the bill, he takes it subject to such agreement. Here there were many things specified as the conditions of the acceptance—the number of hhds. to be delivered—of a certain value rated by the hhd.—the insurance—the bills of lading—the consignment. On the face of the agreement, I thought at the trial, and still incline to think, that the meaning of the parties was, that tobacco should be consigned which should be worth 80 *l.* per hhd.: this fell immensely short of that sum. It is plain the *Hunts* never meant to be in advance, and I think so great a difference in the value such a fraud as to entitle the defendants to relief against the agreement. But as to this the rest of the court have doubted, chiefly because there is no evidence to shew how the decrease in the value arose; whether from the inferiority of the quality, or the fluctuation in the market. But the rest of the court are extremely clear that the subsequent conduct of the plaintiff makes an end of the whole, and I think the reasons are unanswerable. As to that part of the case, it stands thus: the *Hunts* say, “We are not bound: this is an imposition:—the tobacco is of inferior value.” The

"The letter represents it as worth 80*l.*, the insurance makes it 90*l. per hhd.*, and it turns out not to be worth 40*l.*" If *Mason* had meant to say, "You are liable, and shall pay the bills," what would his conduct have been?—He would have left the policy of insurance and the bills of lading in their hands, and sued them upon the acceptance. The temptation to accept was the commission on the consignment, and they were to have the security of the goods and the insurance. But the plaintiff undoes all this, and says, "Then I will take all from you, security, commission," &c. This was saying, "I will stand in your place, but not so as to be answerable for more than the produce of the tobacco." It is impossible the defendants could mean to accept, without any benefit or security. We are all clear, that this made an end of the agreement.

Though the receipt of part from the drawer or indorser be no discharge to the acceptor for more than the part received, yet the receipt of part from the acceptor of a bill, or the maker of a note, is a discharge to the drawer and indorsers in the one case, and to the indorsers in the other, unless due notice be given of the non-payment of the residue; for the receipt of part from the maker or acceptor without notice, is construed to be a giving of credit for the remainder, and the undertaking of the preceding parties is only conditional, to pay in default of the original debtor, on due notice given: but where due notice is given that the bill is not duly paid, the receipt of part of the money from an acceptor or maker will not discharge the drawer or indorsers; for it is for their advantage that as much should be received from others as may be.

The receipt of part from an indorser, is no discharge of the drawer or preceding indorser, for more than the part received.

One *Scraifson* drew a note, by which he promised to pay to one *Pitfield*, or order, the sum of 200*l.*, and indorsed it to *Hull*. *Hull* brought an action against *Scraifson*, in which he held him to special bail; *Hull* recovered interlocutory judgment against *Scraifson*, on which his bail paid the debt and costs, amounting to 220*l.* 15*s.* *Hull* executed an instrument between himself on the one part, and the bail on the other, reciting the note, and that he had recovered interlocutory judgment on it against *Scraifson*: that the bail had purchased the note, and paid the debt and costs, in consideration of which *Hull* assigned over to them the note and the interlocutory judgment, with a power of attorney to make use of *Hull*'s name to sue the indorser, and covenanted in the common manner, not to do any act to hinder the bail from recovering the money on the note. An action was afterwards brought in *Hull*'s name against *Pitfield* the indorser, on which these circumstances were stated, and the court held the indorser was discharged by the payment by the bail in the former action, as much as if the drawer had paid the money himself.]

1 *Ld. Raym.*
744. *Kel-*
lock v. Ro-
binson, 2 *Str.*
745. cited
1 *Willf.* 48.

Bull. N. P.
271. cites
Johnson v.
Kenyon,
C. B. Hill.
5 *Geo.* 3.

Vide John-
son v. Ken-
yon, 2 *Willf.* 262.

Hull v.
Pitfield,
1 *Willf.* 46.

7. Of the Protest: *And herein,*1. *Of the Necessity and Validity of the Protest.*

[A protest is made for non-acceptance, non-payment, and also for better security. This last is usual, when a merchant, who has accepted a bill, happens to become insolvent, or is publickly reported to have failed in his credit, or absents himself from change before the bill he has accepted has become due, or when the holder has any reason to suppose it will not be paid; in such cases he may cause a notary to demand better security, and on that being refused, make protest for want of it; which protest must, as in other cases, be sent away by the next post, that the remitter or drawer may take the proper means to procure better security.]

Mar. 27.
1 Ld. Raym.
743.

Leftley v.
Mills,
4 Term
Rep. 175.
The noting
is a minute
made by the
officer upon
the bill
itself, in
consequence

In making a protest there are three things to be done; the noting, demanding, and drawing up the protest: but the noting is unknown in the law, as distinguished from the protest; it is merely a preliminary step, and has grown into practice only in modern times. The party making the demand must have authority to receive the money, and in case that be refused, the drawing up of the protest is mere matter of form, the demand being the material part.]

of the drawee's refusing to accept or pay, as the case may be, consisting of his (the officer's) initials, the month, the day, and the year, with his charges for minuting. The protest itself is a solemn declaration afterwards drawn up by the officer, that the bill has been presented for acceptance or payment, which was refused, and that the holder intends to recover all damages, which he, or the deliverer of the money to the drawer, may sustain on account of the non-acceptance.

Molloy,
279.
6 Mod. 80.
Saik. 131.
pl. 17.
2 Ld. Raym.
592.

A protest does not raise any debt, but only serves to give formal notice, that the bill is not accepted, or accepted, and not paid; and this by the common law was, and is still necessary on every foreign bill, before the drawer can be charged; but it was not required on any inland bill, before the statute of 9 & 10 W. 3. c. 17.; nor does the want of it since that statute destroy the remedy, which the party had before against the drawer, but only deprives him of interest and costs against the drawer, unless there be notice by protest, as that statute prescribes.

Molloy,
285.
(a) Alleging
in pleading,
that the
party, on
whom the
bill was
drawn, non
sui inventus,
is sufficient
to entitle the party to a protest, without showing that inquiry was made after him; for this shall be intended, being according to the custom of merchants, and is therefore the usual form of pleading in those cases. Carth. 510.

He, to whom the bill is payable, must regularly resort to the drawee, and desire him to accept the bill, before there can be a protest; but if he be dead, or cannot be (a) found, these are good causes for protesting the bill. Also, if after acceptance the drawee die, there is to be a demand of his executors or administrators, and in default of payment, a protest; and in case the money become due before an executor or administrator can be appointed, yet this delay is sufficient cause to protest the bill.

Molloy,
285.

But if he, to whom the money is to be paid, dies, there can be no protest before probate of his will or administration granted; for none but his executors or administrators can give a legal discharge or acquittance for the money, and consequently none others can sue for or demand the same; and though security be offered to indemnify

indemnify the drawee against the executors or administrators, yet is he not obliged to accept thereof, being a matter left entirely to his own discretion, to judge and determine on the sufficiency of such security; and in this case it is said, that if a publick notary protest the bill, an action on the case lies against him.

[Where the drawee cannot be found at the place mentioned in the bill, or has absconded, protest is to be made for non-acceptance in the same manner as if acceptance had been refused on presentment. Mal. 265.]

So also, if the drawee offer an acceptance differing from the tenor of the bill, and the holder be inclined to admit it without giving up his claim on the other parties, he must protest it for that cause; as, if the drawee offer an acceptance for part, the holder may permit him to accept in that way; but then he must cause it to be protested for non-acceptance of the whole, and send the protest to his correspondent, that he may endeavour to procure security for the remaining sum. When the bill becomes due, the holder must present it for payment, and may receive the sum for which it was accepted, and write a receipt for so much on the bill; but he must protest it for non-payment of the rest, and send back the protest with the bill.]

If a bill be left with a merchant to accept, which is (a) lost or mislaid, he to whom it is payable is to request the merchant to give him a note for the payment, according to the time limited in the bill; otherwise there must be two protests, the one for non-acceptance, and the other for non-payment; and though such note be given, yet, if the merchant happens to fail, there must be a protest for the non-payment, in order to charge the drawer.

Molloy, 281.
(a) Where a bill is casually lost, and no new one can be had, and the party on whom it is drawn does

not insist on having the original bill, but refuses payment for another reason, a protest made on a copy is sufficient. Snow. 164.

The protest is usually made by some publick notary; and such protest is *prima facie* good evidence that the bill was not accepted, or, if accepted, that it was not paid, and sufficient to put the proof on the other side.

Molloy, 281.
Skin. 272.
pt. 1.

And as, by the custom of merchants, publick notaries usually protest bills, it hath been held, that pleading *protestavit seu protestari causavit* is sufficient; and that the party may plead *protestavit*, and give in evidence that the publick notary did it.

Comb. 153.

[The demand of payment of a *foreign* bill must be made by the notary publick himself, and not by his clerk; and even in the case of an *inland* bill, it is doubtful, whether the demand, as the foundation of the protest made in consequence of the statute of W. 3. above mentioned, can be made by the notary's clerk, or by any other person, than the notary himself.]

Lestley v. Mills,
4 Term Rep. 170.

2. At what Time to be made; and therein of giving Notice to the Drawer, of the Drawee's Refusal, so as to entitle the Party to Principal, Interest, and Costs.

A protest on a foreign bill of exchange is absolutely necessary to entitle the party to recover against the drawer, not only interest

Molloy, lib. 2. c. 10.
§ 15. 17.

and 31.
Vent. 45.
Skin. 411.

(a) It is said, that in France, if a bill be not presented in two months, the drawer is not answerable, and in Holland in so many posts. Show. 165.

6 Mod. 80.
81. Salk.
131. pl. 17.
2 Ld. Raym.
992.
Comb. 384.
Carth. 510.
Show. 318.

[(b) The practice certainly was formerly, as here stated, to

leave the reasonableness of the time in which payment was to be demanded to the jury. But as this was productive of endless uncertainty, it is now considered as a question of law arising out of the fact. *Metcalfe v. Hall*, B. R. Trin. 22 Geo. 3. Bulk N. P. 275. *Appleton v. Sweetapple*, B. R. Mich. 23 Geo. 3. Bayley on Bills, 73. *Tindal v. Browne*, 1 Term Rep. 167. The periods of time within which bills are to be presented, are, however, still unfixed. The only rule that can be applied is, that due diligence must be used. Due diligence is the only thing to be looked at, whether the bill be foreign or an inland one, whether it be payable at sight, or so many days after, or in any other manner.]

Salk. 127.
pl. 7.
Allen v.
Dockwra, at
Guildhal.

A. drew a bill on *B.* payable in three days, *B.* broke; the person, to whom the bill was payable, kept it by him four years, and then brought *assumpsit* against the drawer; & *per Treby*, Ch. J. When one draws a bill of exchange, he subjects himself to the payment, if the person on whom it was drawn refuses either to accept or pay; yet that is with this limitation, that if the bill be not paid in convenient time, the person to whom it is payable shall give the drawer notice thereof; for otherwise the law will imply the bill paid, because there is a trust between the parties; and it would be prejudicial to commerce, if a bill might rise up to charge the drawer at any distance of time, when in the mean time all reckonings and accounts are adjusted between the drawer and the drawee.

Kyd on
Bills, 177.

[Where the payment of a bill is limited at a certain time after sight, it is evident that the holder must present it for acceptance, otherwise the time of payment would never come; it does not appear,

appear, however, that any precise time, within which this presentment must be made, has in any case been ascertained: but it must be done as soon as, under all the circumstances of the case, it conveniently can be.

Whether the holder of a bill payable at a certain time after the date, be bound to present it for acceptance immediately, or, whether he may wait till it become due, and then present it for payment, is a question which seems never to have had a direct judicial determination: in practice however it frequently happens that a bill is negotiated and transferred through many hands without acceptance, and not presented to the drawee till the time of payment, and no objection ever made on that account.

Mar. 12.

Vide 5 Burr.
2671.
1 Term
Rep. 713.

Where indeed a bill is remitted to a factor or agent, to procure acceptance, for the benefit of his principal, it is the duty of the factor to use all diligence to have it accepted, and to give advice to his principal of the event, that he may take the proper steps in case of non-acceptance; and the factor may be liable to make good any loss to his principal arising from his negligence: but this does not affect the bill itself, nor the right of the principal on it.

Mar. 12,
13. Beawes,
454.

If, however, the holder in fact present the bill for acceptance, and that be refused, he is bound to give regular notice to all the preceding parties to whom he intends to resort for non-payment; to the drawer, that he may know how to regulate his conduct with respect to the drawee, and make other provision for the payment of the bill; and to the indorsors, that they may severally have their remedy in time against the parties on whom they have a right to call: and if, on account of his delay, any loss accrue by the failure of any of the preceding parties, *he* must bear the loss.

Blesard and
Hirst,
5 Burr.
2670.
Goodall v.
Dolley,
1 Term
Rep. 712.

Thus, if in the mean time the drawer fail, the holder cannot call on the payee indorser, because *he* can have no remedy against the drawer.

Blesard v.
Hirst,
5 Burr.
2670.

So, also, if the drawee fail, the holder cannot recover against either the drawer or indorser, because, if he could, a loss must fall on one of them, as the drawer can have no remedy against the drawee.

Goodall v.
Dolley,
1 Term
Rep. 712.

Nor will it make any difference, though the indorser, from an ignorance of the law, thinking himself bound to make good the money, promise afterwards to take up the bill at some future time.

5 Burr.
2670.

Much less can the indorser be bound by a proposal to discharge the bill by instalments, made after the return of the bill for non-payment, under an ignorance of acceptance being refused; more especially, if that proposal be rejected by the indorsee.

1 Term
Rep. 712.

If an acceptance varying from the tenor of the bill be offered by the drawee, the holder acquiescing must send the same notice to the preceding parties, as if acceptance were refused, otherwise he cannot have recourse to them; for to admit of such acceptance without notice is to give credit to the acceptor.

Mar. 17.

It seems established, that the next day after a banker's draft is given, is the stated time allowed by law for demanding payment,

Metcalf
v. Hall,
B. R. Tr.
22 Geo. 3.

in order to exonerate the holder from the consequences of the drawer's insolvency.

2 H. Bl.
569.

Although no precise rule can be laid down as to the time when bills payable at sight, or so many days after, are to be presented for payment, yet it is certain, that if the holder do not present them, he ought to put them in circulation. If he keep them by him, and do neither, he is guilty of laches and cannot recover on them.

We have seen above, that it is the duty of the holder of a bill, whether accepted or not, to present it for payment within a limited time; for otherwise the law will imply that payment has been had, and it would be prejudicial to commerce if a bill might rise up to charge the drawer at any distance of time, when all accounts might be adjusted between him and the drawee.

Reed v.
Coats,
Dom. Proc.
Feb. 21,
1794.

The same diligence, and the same attention to the usual rules of negotiation is required from the party who takes a bill by way of security for an antecedent debt, as from one who receives it in the common course of business, or in solution of a debt. A contrary opinion appears to have prevailed in *Scotland*, and was sanctioned by the decisions of the courts of that country. Thus, a bill drawn by *A.* upon and accepted by *B.*, payable twelve months after date, was given to *C.*, by way of security for the payment of a bill which had been indorsed by *A.* to *C.*, and had been dishonoured. In the receipt which *C.* gave for the bill so given in security, it was declared, that it was in no respect to exonerate the acceptors of the original bill, or any of the parties thereby bound, till actual payment of the bill given in security was made. Almost three years elapsed without *C.*'s taking any one step to obtain payment of this last bill. About that time the acceptors failed, upon which *C.* demanded payment of the original bill from the parties whose names appeared upon it, and on their refusal, he instituted a suit against them in the court of session, and obtained two interlocutors in his favour. Upon appeal to the Lords of this country, these interlocutors were reversed, and the defenders were absolved.

Taffel v.
Lewis, 1 Ld.
Raym. 743.
Coleman v.
Sayer;
2 Str. 829.

The time of payment of a bill is the last of the three days of grace, and on that day the money must be demanded; and if the last day be *Sunday* or a great holiday, the demand must be made on the second.

Vide Beawes, 461.

Lestley
v. Mills,
4 Term
Rep. 173.
Brown v.
Harraden,
4 Term
Rep. 148.

And the holder is not bound to wait till the last moment of the last day of grace, for the undertaking of the acceptor is, to pay the bill on demand on any part of the last day of grace.

The three days of grace are allowable on promissory notes, as well as upon bills of exchange.

A presentment either for payment or acceptance must be made at seasonable hours: and seasonable hours are the common hours of business in the place where the party lives to whom the presentment is to be made.

As to bills,
vide 1 Str.
441. 515.

It is not enough to say in the notice, that the drawee or maker refuses, is insolvent, or has absconded; but it must be added, that

the holder does not intend to give him credit. The purpose of giving notice is not merely that the indorser should know that default has been made, for he is chargeable only in a secondary degree; but to render him liable, it must be shewn that the holder looked to him for payment, and gave him notice that he did so. A case might easily be imagined, where the indorser might have notice from the holder, and yet would not be liable; as, if that notice contained circumstances which shewed that the indorsee had given time and credit to the acceptor or maker.

Daggliff v. Weatherby,
2 Bl. Rep.
747. As to notes, vide
1 Str. 549.
2 Str. 1087.
Tindal v. Brown,
1 Term Rep. 179.

It is therefore necessary that notice should come from the indorsee himself: it is not sufficient that the indorser should be informed by some third person, as by the drawee or maker, that he does not choose to accept, or cannot pay.

With respect to acceptance, it is usual to leave a bill for that purpose with the drawee till the next day, and that is not considered as giving him time; it being understood to be the usual practice: but if, on being called on the next day, he delay or refuse to accept according to the tenor of the bill, the rule now established, where the parties, to whom notice is to be given, reside at a different place from the holder and drawee, is, that notice must be sent by the next post. Under the same circumstances, the same rule obtains in the case of non-payment.

Mar. 16.

1 Term Rep. 169.

So, also, in case the drawee or maker has absconded, or cannot be found, notice of these circumstances, either in case of non-acceptance or non-payment, must be sent by the first post.

The reason why the law requires notice is, that it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and that if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if the drawer have no effects in the other's hands, then he cannot be injured for want of notice, and if it be proved on the part of the plaintiff, that, from the time the bill was drawn, till the time it became due, the drawee never had any effects of the drawer in his hands, notice to the latter is not necessary in order to charge him, for he must know whether he had effects in the hands of the drawee or not: and if he had none, he had no right to draw upon him, and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice, that it has been dishonoured.

1 Term Rep. 410.

A question arising on the validity of a commission of bankrupt on account of the insufficiency of the debt due to the petitioning creditor, the facts appeared to be these: the bankrupt being indebted to the petitioning creditors in the sum of 115 £ . 3s. 8d. on the 15th of September 1784, drew a bill for 20 \% . on the defendant, "who, till the time of the bankruptcy and of the bill becoming due, was a creditor of the bankrupt," payable to the petitioning creditors, two months after date, and paid it to them on account of part of their debt: the bill was presented for payment on the 18th of November following, and dishonoured. No notice, however, was ever given by the petitioning creditors to the bankrupt, or left at his house;

Bickerdike v. Bollman,
1 Term Rep. 405.

house; a commission issued against the drawer on the 20th of November, on which he was declared a bankrupt in the afternoon of the 24th; that commission was afterwards superseded, and another commission was issued on the petition of the parties, on the amount of whose debt the present question arose. If the petitioning creditors, by not giving notice to the bankrupt of his bill being dishonoured, had made the bill their own, their debt was reduced within 100 *l.*, and then the commission could not be supported; but if notice was not necessary, the bill was not paid; their debt remained as it originally was, and the commission was valid. On the principles before stated, the court held, that notice in this case was not necessary, and therefore the commission was good.

2 Term.
Rep. 714.

Yet though it appear that the drawer had no effects in the hands of the drawee, no action can be maintained against the *indorfor* if no notice was given him of the bill being dishonoured; for though the drawer may have received no injury, the *indorfor*, who must be presumed to have paid a valuable consideration for the bill, probably has.

Rogers v.
Stephens,
2 Term
Rep. 713.

Though in the case where the drawer has effects in the hands of the drawee, the want of notice cannot be waived by a subsequent promise by him to discharge the bill; yet where he had no effects, it may; though it appear that in fact he sustained an injury for want of such notice: such a subsequent promise is an acknowledgment that he had no right to draw on the drawee, and if he has in fact sustained damage, it is his own fault.

See Rogers
v. Stephens,
2 Term
Rep. 714.
Molloy,
284.
Show. 164.
S. P. that
the third
day is the
day of grace.

But where damage in such a case has been sustained, and no subsequent promise appears, it may be very doubtful whether want of notice can be waived.]

Merchants generally allow three days after a bill becomes due for the payment, and for non-payment within three days protest is made, but is not sent away till the next post after the time of payment is expired, and if *Saturday* be the third day, no protest is made till *Monday*.

Lestley v.
Mills,
4 Term
Rep. 170.

[But there is a difference between foreign and inland bills in this respect: the former must be presented for payment *before* the expiration of the last day of grace, and in time to have the protest sent off the same night, if the post then sets out: but on inland bills, the protest cannot be made till *after* the expiration of three days, and notice may be sent at any time within *fourteen* days after the protest.

To the constitution of a bill of exchange, it is not necessary that the words "value received" should be inserted, and the want of these in a foreign bill cannot deprive the holder of the benefit of a protest; but that benefit in case of non-payment is not given to inland bills which want these words; and therefore they cannot be protested for non-payment: for the act of *Queen Anne* provides, that "where these words are wanting, or the value is less than twenty pounds, no protest is *necessary* either for non-acceptance or non-payment."

In foreign bills, there is no distinction between those payable at such a time after *date*, and after *sight*; but the statute confines the benefit of protest on inland ones to those payable after *date*; so that in *strictness* there can be no protest on those payable after *sight*: and this has been lately so adjudged.

In foreign bills, where the acceptance is in words only, or in some collateral writing, a protest may be made for non-payment, as well as if the acceptance had been in writing on the bill: but the statute of *William* confines the protest for non-payment to those bills on which the acceptance is written; and therefore, in order to have the benefit of a protest for non-payment, where the acceptance is collateral, the holder must protest for non-acceptance.

But in practice a protest is hardly ever made for non-acceptance of an inland bill; it is only noted for non-acceptance, and if not paid when due, it is frequently protested for non-payment: however, notice must be given of the non-acceptance and noting, otherwise, the holder takes the risk upon himself.

In the case of a foreign bill, noting alone for non-acceptance will not be sufficient, it must also be *protested* for non-acceptance; nor will the omission to make such protest be supplied by a subsequent protest for non-payment.]

Interest upon a bill of exchange commences from the demand made; and therefore if there was no demand made till action brought, defendant may plead tender and refusal, and *uncore prist*, and so discharge himself of interest; but if it be the defendant's fault, that demand could not be made, as if he were out of the kingdom, there, want of demand ought not to prejudice the plaintiff.

[Wherever interest is allowed, and a new action cannot be brought for it, which is the case on bills of exchange and promissory notes, the interest is to be calculated up to the time of signing final judgment.]

Where a bill indorsed over is not duly paid, the indorsee may charge the indorser with interest, exchange, and other incidental expences, beyond the amount of *5 per cent.*, if such charges be reasonable, warranted by usage, and not made a colour for usury: thus, the constant course has been with respect to bills returned, protested, from *India*, to allow *10s. per pagoda*, which includes interest, exchange, and all other charges; and this, notwithstanding the current price of exchange at which the bill was discounted, may have been greatly below *10s.*, as, at *6s. 6d.*: and the indorsee will also be entitled to interest at *5 per cent.* from a reasonable time after notice given to the indorser of the bill having been returned unpaid.]

8. Of the Action and Remedy on a Bill of Exchange, and Manner of declaring and pleading therein.

It seems to be agreed, that against the drawer an action of debt, or a general *indebitatus assumpsit*, will lie, for he having received the money,

Lefley v.
Mills,
4 Term
Rep. 170.
Vide Mar.
17.

Rogers v.
Stephens,
2 Term
Rep. 713.

2 Burr.
1086.

Auriol v.
Thomas,
2 Term
Rep. 52.

Hard. 485.
Vent. 152.
Lev. 293.

2 Keb. 695.
713. 758.
822. Salk.
125. pl. 2.
2 Lutw.
1594. Skin.
255. pl. 3.
6 Mod. 129.

money, the law raises a contract, and lays him under an obligation to pay it. But it hath been adjudged, that neither an action of debt, nor an *indebitatus assumpsit*, will lie against the acceptor of a bill of exchange, and that therefore the remedy against him must be by a special action on the case, founded on the custom of merchants; for the acceptance is only a collateral engagement to pay the debt for another, in the same manner as a promise by a stranger to pay, &c. if the creditor will forbear his debt.

Vent. 153.
(a) So, if
goods deli-
vered. Roll.
Abr. 32.

But though a general *indebitatus assumpsit*, will not lie against the acceptor of a bill of exchange, yet if *A.* delivers money to *B.* to pay over to *C.*, and gives *C.* a bill of exchange drawn upon *B.*, and *B.* accepts it, *C.* may have an *indebitatus assumpsit* against *B.* (a) as having received money to his use, but must not declare only upon the bill of exchange accepted.

Co. Lit. 182.
2 Inst. 404.
Yelv. 136.
4 Co. 76.
Cro. Car.
307. Hard.
486. Salk.
125. pl. 2.
127. pl. 7.
Lutw. 233.
Carth. 83.
269.
5 Mod. 367.

As to the manner of declaring on a bill of exchange, this is said to have varied, the declaration in some cases being general, sometimes special, and laid with an express promise, and at other times without; but it seems to be now settled, that the custom of merchants, concerning bills of exchange, being part of the common law, of which the judges will take notice *ex officio*, it is unnecessary to set forth the custom specially in the declaration, and that it is sufficient to say, that such a person, according to the usage and custom of merchants, drew the bill.

Show. 127. 3 Mod. 226. Ld. Raym. 175. 281. 575. 759. 774. 10 Mod. 287.

1 Burr. 324,
325.

[In stating a bill or the note, regard must be had to the legal operation of each respectively.

Vere v.
Lewis,
3 Term
Rep. 185.
Minet v.
Gibson,
Id. 485.
Collins v.
Emet, 1 H.
Bl. 313.

It has been decided, that the legal operation of a bill or of a note, payable to a fictitious payee, is, that it is payable to the bearer, and therefore, if that decision be right, it is proper, in the statement of such a bill, to allege that the drawer thereby requested the drawee to pay so much money to the bearer; in the statement of such a note, that the maker thereby promised to pay such a sum to the bearer. Or in such a case, the plaintiff may state all the special circumstances, and if the verdict correspond with them, he will be entitled to recover.

A bill or note payable to the order of a man, may, in an action by him, be stated as payable to himself, for that is its legal import: or it may be stated in the very words of it, with an averment that he made no order.

Semb.
1 Burr. 323.

If a note purport to be given by two, and be signed only by one, a declaration generally as on a note by that one who signed it will be good; for the legal operation of such a note is, that he who signed it promised to pay.

Burchell v.
Slocock, 2 Ld.
Raym. 1545.

On a note to pay jointly and severally, a declaration against one in the terms of the note will be good.

Butler v.
Mallesey,
Str. 76.
Neale v.
Ovington,
2 Ld. Raym.
1544.
2 Str. 819.

Where a note is given by two, to pay jointly or severally, the payee may sue both or either; if he sue both, he may declare on the note in the words of it jointly or severally: but if he sue either of them singly, it was formerly held, that he could not declare in that way, but that he must state the note as given only by one, and

and that the joint *or* several note would be good evidence to support such a declaration.

But the doctrine in the latter case has been since over-ruled; and it is now held, that in an action on a joint *or* several promissory note, against one, a declaration that he and another made their promissory note, by which they *jointly or severally* promised to pay, is good: for if *or* must be understood as a disjunctive, the election, whether the note shall be joint or several, is in the person to whom it is given, and by suing one, he shews his election to consider it as a several note: but in this case, the true construction of the word *or* is, that it is synonymous with *and*. They both promise that *they or one* of them shall pay; therefore the liability is on *both*, and on *each*. The nature of the transaction forces this construction.

Rees v. Abbot, Cowp. 232.

And if the note had been joint only, and it had been stated as a several one, no advantage could have been taken of this but by a plea in abatement.

Ibid. per Buller, J.

Where the payment of a bill or note is limited at a certain time after the date, it must be stated as being made on the day of the date, that it may appear on the face of the declaration, at what time it became due; if the bill have no date, as on the day when it issued, or the first day the plaintiff had knowledge of its existence; for an instrument not dated must be considered as dated at the time of the delivery.

1 Str. 22.

But in stating the bill or note, it is not necessary to allege that it bore date, though that be generally done; it is sufficient that the date appear by implication, which it does from the allegation, that on such a day the drawer made the bill or note.

2 Ld. Raym. 1082.

2 Show. 422.

In stating the drawing of a bill or note, it is unnecessary to say that the drawer subscribed it with his own hand-writing, though that is generally done; the allegation that he made his bill of exchange or promissory note, and, in the case of the former, that he directed the bill to the drawee, by which he requested him to pay, and in the case of the latter, that by such note he promised to pay, sufficiently implies that his name was somewhere on the instrument, and that he or somebody by his authority wrote it; otherwise it could not with propriety be said that he requested in the one case or promised in the other.

Ereskine v. Murray, 2 Ld. Raym. 1542, 1543. Taylor v. Dobbins, M. 7 G. 1. B. R. 2 Ld. Raym. 1543. Elliot v. Cooper, 2 Ld. Raym. 1376.

If the bill was in fact drawn by a servant, by the authority of a master, it is sufficient to state it as drawn by the master himself, unless the subscription be alleged, and then it must be stated according to the truth of the case, that the servant, by the authority of his master, drew and subscribed the bill on his master's account.

Vide 12 Mod. 346.

The same observations apply to the case of an indorsement or acceptance by the servant, by the authority, and on the account of his master.

Vide 12 Mod. 564.

Where partners are concerned in the drawing, negotiating, or accepting of a bill or note, the usual way of introducing the partnership is to mention it by way of inducement, and to state that one of them, according to the custom of merchants, subscribed, accepted,

Vide Morg. Prec. 43.

accepted, or indorsed the bill for the partnership account: but the allusion to the custom is not absolutely necessary; nor is it absolutely necessary that it should be directly charged that the partner acting for the rest subscribed, accepted, or indorsed for the partnership; it is sufficient if, on the whole, it appear to have been so.

Where a bill is drawn in sets, and the action is brought on the first, the usual way of stating the request to the drawee is, "that he requested him to pay that first of exchange, (second and third not paid,) following the very form of the bill;" and then it is not necessary, in the subsequent part of the declaration, to aver that the second and third were not paid, for if either of them was paid, that would be a sufficient defence at the trial.

In an action against the acceptor, it must be alleged that he accepted the bill, for the acceptance is the foundation of the action; but the manner of acceptance needs not to be alleged.

And if the acceptance be alleged generally without any specification of time, evidence of acceptance after time of payment will maintain the declaration, though the acceptance be alleged to have been according to the tenor and effect of the bill, for this shall be construed as a general promise to pay the money, and the words, "according to the tenor and effect of the bill," shall be rejected as surplusage; but if the acceptance be alleged to have been *before* the time of payment, perhaps evidence of an acceptance after will not do.

In an action against the drawer or indorser of a bill, or against the indorser of a note, it is absolutely necessary, on account of non-payment of the bill or note, to state a demand of payment from the acceptor of the bill or the maker of the note, and due notice of refusal given to the party against whom the action is brought; for these circumstances are absolutely necessary to entitle the plaintiff to maintain his action; and a verdict will not help him on a writ of error.

Due notice of the dishonour of a foreign bill can only be by protest; yet the omitting to allege a protest in the declaration is only matter of form; notice being alleged generally, it shall be presumed to have been given with all the necessary formalities, and if these be not proved at the trial, the plaintiff cannot recover.

It is not necessary, in an action against an indorser, to state that the indorsee demanded the money of the drawer of a bill, or the first indorser of a note, because such demand is not necessary to be made in order to complete the title of the indorsee.

Whether the drawer of a bill, or the indorser of a bill or of a note, receiving the bill or the note in the regular course of negotiation before it has become due, can maintain an action on it, against the acceptor or maker, in the character of indorsee, seems undecided: that such actions have been brought, has been incidentally said from the bench; but the only case in which it is directly held, that the drawer may maintain an action in the character

acter of indorsee, is no authority to establish this point: for there it appears that the bill was protested for non-payment before the indorsement; and a more recent case, determined on principle, clearly shews that a drawer or indorfor cannot maintain an action against the acceptor in the character of indorsee, where the indorsement is after the refusal of payment; because, when a bill is returned unpaid, either on the drawer or indorfor, its negotiability is at an end.

The action, therefore, in which the drawer or indorfor, after payment of the money in default of the acceptor, may recover, the first against the acceptor, and the latter against any of the preceding parties, must be brought in their original capacity as drawer or indorfor, and not as indorsee.

In this action, after stating the drawing of the bill, the delivery, the necessary indorsements, the presentment for acceptance, and the acceptance or refusal to accept, it must be further stated, that at the proper time it was presented to the acceptor for payment, who refused, or that the acceptor could not be found; and if on a foreign bill, a protest for non-payment may be stated; then that it was returned to the plaintiff, and that the defendant had notice of the premises.

It may also be stated, that the plaintiff paid the contents of the bill, and, in the case of a protest, the costs, interest, and damages arising from the delay; but this does not seem absolutely necessary; that the bill was returned to the plaintiff implies payment by him.

One who has indorsed a bill or note cannot, in general, maintain an action on a re-indorsement to him, against the party to whom he indorsed it.

It is not necessary, in any action on a bill of exchange or promissory note, to state an express promise by the defendant: the law implies a promise where the party is liable; and therefore it is sufficient, after stating the circumstances, to say, that by these he became liable to pay.

But it is usual to allege an express promise after stating the liability, that no exception may be taken to the addition of other counts in *assumpsit*, which are usually added; for it is said, that where the declaration was upon the custom, and likewise on an *indebitatus assumpsit*, the judgment was arrested, which could not have been the case had an express promise been added to the count on the custom, because it is an established rule in pleading, that wherever the same plea may be pleaded, and the same judgment given on different counts, they may be joined in the same declaration.

Instead of bringing an action on the custom or on the statute, the plaintiff may in many cases use a bill or note, only as evidence in another action; and where the instrument wants some of the requisites to form a good bill or note, the only use he can make of it is to give it in evidence; or if the count on the instrument be defective, he may give it in evidence, in support of some of the other counts for money had and received, or money lent

Laubray,
10 Mod. 36.
Beck v.
Boble, Tr.
14 G. 3.
B. R. 1 H.
Bl. 89. in
the notes.

Vide Sy-
monds v.
Parminter,
1 Will. 185.
Vide Morg.
Prec. 43,
44-50.

2 Show.
180.

1 Will. 185.

Vide Morg.
Prec. 44.

Bishop v.
Hayward.
4 Term
Rep. 470.
Starkey v.
Cheeseman.
1 Ld. Raym.
538.
1 Salk. 128.
Carth. 409.

1 Vent. 159.
Vide 1 Salk.
24.

1 Term
Rep. 276.

Tatlock v.
Harris,
3 Term
Rep. 174.

lent and advanced, according to the circumstances of the transaction.

Vide Grant

v. Vaughan,

3 Burr.

1516.

Vide 3 Term

Rep. 185.

A bill is presumptive evidence of money lent by the payee to the drawer, and a note of money lent by the payee to the maker, and both, consequently, of money had and received to the use of the holder, whether they be payable to the bearer, or to the order of the payee.

He who transfers a bill or note without indorsement, gives no additional credit to the instrument, and therefore cannot be sued on the instrument itself; nor is he liable to answer in any species of action to any holder but him to whom he immediately transferred it, and to him only for the consideration on which it was given, whether for work and labour, goods sold and delivered, money lent and advanced, or any other legal consideration.

Vide Cham-

berlyne v.

Delarive,

2 Will. 353.

But if the party who took the bill or note did not use due diligence to obtain payment from the acceptor or maker, nor give due notice of their default to the party from whom he received it; the latter may either plead, or give in evidence, the bill or note, to an action on the original consideration.

The holder of the bill or note may sue all the parties who are liable to pay the money, either at the same time or in succession, and he may recover judgment against all, if satisfaction be not made by the payment of the money before judgment obtained against all; and proceedings will not be staid in any one action, but on payment of the debt and costs in that action, and the costs in all the others in which he has not obtained judgment.

Vide Gold-

ing v. Grace,

2 Bl. Rep.

749.

2 Vesey,

115.

But though he may have judgment against all, yet he can recover but one satisfaction. But though he be paid by one, he may sue out execution for the costs in the several actions against the others.

Windham

v. Wither.

Idem v.

Trull,

1 Str. 515.

And if he have recovered judgment in more than one action, a tender of the principal recovered in one, and the costs in all the rest, will prevent him from taking out execution; and it will be considered as a contempt of the court, if he take out execution against more than one.

Macdonald

v. Bovington,

4 Term

Rep. 325.

Macdonald drew a bill of exchange for 20*l.* on *Bovington*, who accepted it; the bill afterwards came into the hands of *Thompson*, who recovered judgment against *Bovington*, and charged him in execution. *Bovington* having obtained his discharge under the Lords' act in that suit, *Thompson* sued *Macdonald* the drawer, and recovered the amount of the bill, on which *Macdonald* sued *Bovington*, on his acceptance, and charged him in execution. On a rule to discharge *Bovington* out of custody, it was contended, that he had satisfied the debt, by being charged in execution at the suit of *Thompson*, and that he was not liable to be sued again for the same sum. But the court said, that nothing could be more clear than that this was not a satisfaction of the debt as between these parties, though it was as between the defendant and *Thompson*: that to the holder it was a mere formal satisfaction, and not like actual payment: that the present plaintiff, having been obliged to pay the amount of the bill since the defendant was charged

charged in execution at the suit of *Thompson*, had a right to have recourse to this defendant as acceptor; for that by this payment a new cause of action arose against the defendant, without regard to what had passed in the former action.

The plea generally pleaded to this action is that of *non assumpsit*: but the defendant may, if the truth will warrant him, plead *non assumpsit infra sex annos*; for by statute 21 *Jac.* 1. c. 16. actions on the case, except upon *accounts* between merchants, must be brought within six years: and by the express provision of the statute of *Queen Anne*, all actions on promissory notes must be § 2. brought within the same time as is limited by the statute of *James*, with respect to actions on the case.

But an acknowledgment of the debt, or a promise to pay, made within six years of the commencement of the action, will take the case out of the statute.

To an action on the case on a bill of exchange against the defendant as acceptor, he pleaded, that after acceptance he gave a bond in discharge of it: it was held that this plea was bad, because it amounted to the general issue; for the debt on the bill being extinguished by the bond, the defendant ought to have pleaded *non assumpsit*, and to have given the bond in evidence. 8 W. & M. 5 Mod. 314.

In an action against the acceptor, it is a general rule that the drawer's hand is admitted, because the acceptor is supposed to be acquainted with the writing of his correspondent, and by his acceptance he holds out to every one who shall afterwards be the holder, that the bill is truly drawn. 1 Ld. Raym. 444. *Jenys v. Fowler*, Str. 946. Price v. Neal, 3 Burr. 1354. 1 Bl. Rep. 390.

On a bill payable to bearer, there is no person through whom the holder derives his title: in an action against the acceptor, therefore, he has only to prove the hand-writing of the acceptor himself.

In an action against the acceptor of a bill payable to order, the plaintiff must prove the hand-writing of the payee or first indorser; and this, though it were on the bill at the time it was accepted: if his indorsement be special to "another person," or to "another, or his order," the same rule, on the same principle, applies to the indorsement of that other person, as it does to the indorsement specifically made of every subsequent indorser, between the payee and plaintiff. If the indorsement of the payee be general, the proof of his hand-writing is sufficient; that of any other of the indorsors is not requisite, though all the subsequent indorsements be stated in the declaration; for by indorsing generally, the payee has shewn his order to be, that the bill should be payable to any subsequent holder; and accordingly it has been shewn, that any such subsequent holder may declare as the indorsee of the first indorser, or of that indorser who first indorses in blank: but in this case, in order to render the evidence correspondent to the declaration, all the subsequent names must be struck out, either at the time of the trial or before. Smith v. Chester, 1 Term Rep. 654.

Vide Collins
v. *Emett*,
1 H. Bl.
313.

In an action by an indorsee against the drawer, the same rules obtain with respect to proof of the hand-writing of the indorsors, as in an action against the acceptor.

That of the drawer himself must of course be proved: it must also be proved, that the plaintiff has pursued that diligence with respect to the drawee, and given such notice to the drawer, of the default of the former, as we have seen to be necessary on his part to entitle him to have recourse to the latter.

From the rule that, in an action against the drawer or acceptor of a bill payable to order, there must be proof of the signature of the first indorser, and of all those to whom an indorsement has been specially made, has arisen the question which has so long agitated the commercial world on the subject of indorsements, in the name of fictitious payees.

Minet v.
Gibson,
3 Term
Rep. 483.
Gibson v.
Hunter,
2 H. Bl.
288.

The result of the cases upon this point seems to be, that in all cases, where the holder of such a bill declares against the acceptor, as on a bill *payable to the bearer*, it is sufficient to maintain the action, that he should prove, 1. That the payee was fictitious, and, 2. That the defendant knew this at the time when he accepted the bill:—or, 1. That the payee was fictitious, and, 2. That the defendant had given a *general* authority to the drawer, &c. to draw bills upon him in the name of fictitious payees.

1 *Ld. Raym.*
174.
Str. 444.
2 *Burr.* 675.

In an action by an indorsee against an indorser, it is not necessary to prove either the hand of the drawer or of the acceptor, or of any indorser before him against whom the action is brought; for by his indorsement, he virtually undertakes to every subsequent holder, that the names of the drawer, acceptor, and previous indorsors are really in the hand-writing of those to whom they respectively purport to belong.

The same diligence also, with respect to the drawee, and the same notice to the defendant as indorsee, must be proved in this action, as in that against the drawer, every indorser being, with respect to subsequent indorsees or holders, a new drawer. But proof of a demand from the drawer, and notice of non-payment by him, is not necessary.

1 *Ld. Raym.*
743.

Where the action is by an indorser who has paid the money, proof must be given of the payment.

Vide Lou-
vriere v.
Laubray,
10 Mod.
36, 37.
Symonds v.
Parminster,
1 *Will.* 185.

In an action by the drawer against the acceptor, it is necessary to prove the hand-writing of the latter; demand of payment from him, and refusal; the return of the bill, and payment by the plaintiff: but it does not appear necessary to prove, that the acceptor had in his hands effects of the drawer; his acceptance is presumption that he had, and if he had not, the proof must lie upon himself.

Vide 3 *Will.*
18.

In an action on the case by the acceptor against the drawer, the plaintiff must prove the hand-writing of the defendant, and payment of the money by himself, or something equivalent to that, such as his being in prison in execution.

In actions against the drawer or indorser, the protest is sufficient evidence that the bill is not paid; and the mere production of the protest is sufficient; it is not necessary to prove either the writing of the notary, or to give any account how the plaintiff had the protest; for that would be destructive to publick commerce, and throw too great a difficulty on transactions of this kind: and beyond seas, it is said, that it is sufficient to shew the court the protest without producing the bill itself; but here in general the bill itself must be shewn, as well as the protest, because the whole declaration must be proved, which cannot be without giving the bill in evidence.

12 Mod.
147
Cib. L. E.
113.

Gib. L. E.
119.

But in an action against the drawer of a bill which was lost, it was held by *Holt, C. J.* that proof of the defendant's having owned that he had made the bill was sufficient.

Hart v.
King,
12 Mod.
309.

With respect to a promissory note, the same rules, of what is necessary to be proved, apply, as in a bill of exchange; the maker being in the place of the acceptor; the payee, after indorsement, in that of the drawer; and the indorsors and indorsees the same in each.

In general, direct proof is required of the signature of those parties whose indorsement must be proved: but with respect to the party himself against whom the action is brought, proof of other circumstances may be sufficient to supply the place of actual proof of his signature; particularly, confession. Thus, where the defendant was sued as indorser of a note, and it was proved, that a person to whom application had been made to discount it, sent it to the defendant, who looked on it, and said it was his hand, and that the note, which had some months to run, would be paid when due; the Chief Justice would not permit the defendant to shew forgery, by similitude of hands, because that would tend to destroy all negotiation of bills and notes. But he seemed inclined to have admitted actual proof of forgery, if the defendant could have given it, but this he was unable to do, and the plaintiff had a verdict.

Ld. Hard-
wicke.
Cooper v.
Le Blanc,
2 Str. 103.

So, where a letter was produced under the defendant's hand, in which he wrote to a friend that he had received a bill of exchange from the drawer on the acceptor, bearing date such a day, and payable to him or order six months after date, and in all these circumstances the bill agreed with the letter, though no sum was mentioned in the letter, this was thought sufficient evidence that the defendant had had the bill in question in his possession; and to shew that he had indorsed it over, it was proved that he had said he had come to town to hasten the trial of a cause brought against him on an indorsement he had made on a bill of exchange, and that in fact he had brought down this very cause by proviso.

Dale v.
Lubbock,
1 Barnard.
B. R. 198.

But where, in an action against any one party, proof of the signature of another is necessary to support the action against the defendant, that proof must be direct; confession of the party whose signature it purports to be, will not be sufficient evidence.

Barnes, 436.
Hemmings
v. Robinson.

Thus in an action against the drawer or acceptor of a bill, or maker of a note, a confession of an indorser that he indorsed the bill or note, will not be proper proof of the indorsement.

Whitcomb
v. Whiting,
Dougl. 652.

But where an action is brought against one, on a joint and several promissory note, signed by him and others, proof of payment by one of the others, of interest and part of the principal within six years before the action brought, will be sufficient to bind the defendant, and take the case out of the statute as to him.

Pinkney
v. Hall,
1 Salk. 126.
1 Ld. Raym.
175. *vide*

Carwick v. Vickery, Dougl. 653. Gilb. L. E. 117.

Where a bill is accepted, or a bill or note is drawn or indorsed by one of two or more partners, on the partnership account, proof of the signature of the partner accepting, drawing, or indorsing, is sufficient to bind all the rest.

Where a servant has a general authority, to draw, accept, or indorse bills or notes, proof of his signature is sufficient against the master; but his authority must be proved.

Comb. 450.
12 Mod.
346.

Subsequent assent, it seemeth, is evidence of authority.

A general custom of the servant's signature, and payment by the master, is sufficient proof of a general authority; and a general authority will continue to bind the master till its determination be generally known. Therefore, if a servant, having authority, draw a bill of exchange in so short a time after he is dismissed, that the world cannot take notice of his being out of service; or, if he were a long time out of service, but that kept so secret, that the world could not take notice of it, the bill in those cases will bind the master.

1 Barnard.
B. R. 198.

Where notice is to be given by the post, it seemeth, that proof of putting the letter into the post is sufficient, that being in general all that is in the plaintiff's power to prove, though this in one place is denied.

Bevis v.
Lindfell,
B. R. 2 Str.
1149.
Green v.
Hearne,
3 Term
Rep.

Where the defendant suffers judgment by default, and the plaintiff executes a writ of inquiry; it is sufficient for the latter to *produce* the note or bill, without any proof of the defendant's hand: this was determined so long ago as the 14th G. 2. in a case in the King's Bench, where the plaintiff having offered *collateral* evidence to prove the defendant's hand, the court not only held that this was sufficient, but said, that the note being set out in the declaration, was admitted by the default, and that the only use of producing it was, to see whether any money was indorsed on it as paid.

Ruled Anon.
B. R. Hil.
26 Geo. 3.
Bailey, 67.
Rafshleigh v.
Salmon, C. B. T. 29 Geo. 3. 1 H. Bl. 252.

On such judgment, a writ of inquiry is not necessary, for the court on application by the plaintiff will, if no good reason shewn to the contrary, refer it to the proper officer to ascertain the damages and costs, and calculate the interest.]

[(N) Of the Provisions for the Encouragement of Shipping and Navigation.]

1. Of the Plantation Trade: And,

1. Of the General Trade with the Foreign Dominions of his Majesty in *Asia*, *Africa*, or *America*.

NO goods or commodities may be imported into, or exported out of, any colony or plantation to his Majesty, in *Asia*, *Africa*, or *America*, belonging, or in his possession, but in *British*-built ships, owned by *British* subjects, and navigated by a master and three-fourths at least of the mariners *British* subjects. St. 7 & 8 W: 3. c. 22.

Except such goods and commodities as may be imported into, and exported from the free ports in the islands of *Jamaica*, *Grenada*, *Dominica*, and *New Providence*, and from the port of *St. John's* in the island of *Antigua*, by foreign ships, owned and navigated by the subjects of some foreign *European* sovereign or state, or by any persons inhabiting any country on the continent of *America*, under the dominion of some foreign *European* sovereign or state (a); except salt, which may be exported from *Turk's Island*, in ships belonging to any of the *United States* (b); and except sugar and coffee the produce of any foreign country or plantation, which may be imported into such port or ports in the islands called *Caiicos*, as his majesty in council shall approve, in foreign ships (c). (a) Stat. 27 G. 3. c. 27. stat. 30 G. 3. c. 29. stat. 31 G. 3. c. 39. stat. 33 G. 3. c. 50. (b) Stat. 28 G. 3. c. 6. § 9. (c) Stat. 33 G. 3. c. 50. § 10, 11, 12.

No sugar, tobacco, cotton-wool, indigo, ginger, fustick, or other dying woods, rice, molasses, copper-ore, coffee, pimento, cocoanuts, whale-fin, raw silk, hides or skins, pot or pearl ashes, iron or lumber, of the growth, production, or manufacture of any *British* plantation in *Asia*, *Africa*, or *America*, may be transported to any place whatsoever (d), other than to some *British* plantation, or to *Great Britain*, or to *Ireland* (e). § 22. ft. 4 G. 3. c. 15. § 27. (e) St. 20 G. 3. c. 10. (d) Stat. 12 Car. 2. c. 4. § 18. ft. 25 Car. 2. c. 7. ft. 3 & 4 Ann. c. 5. § 12. ft. 8 G. 1. c. 18. 20 G. 3. c. 10.

Except sugars, which may be carried from the sugar colonies to any part in *Europe*, in a ship clearing out from *Great Britain*, and having a licence from the commissioners of the customs for that purpose (f); and lumber, which may be carried from any *British* colony or plantation to the *Madeiras*, or the *Western Islands*, called *Azores*, or to any part of *Europe* to the southward of *Cape Finisterre* (g). (f) Stat. 12 G. 2. c. 30. (g) Stat. 5 G. 3. c. 45. § 22.

All other goods and commodities, not so enumerated, being the growth, production, or manufacture of any *British* colony, or plantation in *Asia*, *Africa*, or *America*, may be transported to any place whatsoever; except hops to *Ireland* (h); rum, and other spirits to the *Isle of Man* (i); rum to *Guernsey* and *Jersey* (k); and *East India* goods, which must be brought to the port of *London* (l). (h) Stat. 5 G. 2. c. 9. (i) Stat. 5 G. 3. c. 39. (k) Stat. 9 G. 3. c. 28. § 1, 2. (l) St. 7 G. 1. ft. 1. c. 21. § 9.

No goods or commodities of the growth, production, or manufacture of *Europe*, may be imported into any land, island, plantation, colony, territory, or place, to his Majesty belonging, or in his possession in *Asia*, *Africa*, or *America*, but such as shall be shipped in *Great Britain* (m) or *Ireland* (n). (m) Stat. 15 Car. 2. c. 7. § 6. (n) Stat. 20 G. 3. c. 10.

(a) Stat. 15 Car. 2. c. 7. § 7. Except salt for the fisheries of *Newfoundland*, and wines from the *Madeiras* (a), and from the *Western Islands of Azores*; and craft, clothing, or other goods, the growth, production, or manufacture of *Great Britain*, *Guernsey*, or *Jersey*, or food or victuals, the growth, production, or manufacture of *Great Britain*, *Ireland*, *Guernsey*, or *Jersey*, from *Guernsey* or *Jersey* to *Newfoundland*, or any other *British* colony, where the fishery is carried on, for the use of the fishery (b).

(b) Stat. 9 G. 3. c. 28.

Lands, islands, territories, or places, to his Majesty belonging, in *Asia*, *Africa*, or *America*, not being colonies or plantations, are not included in any of the foregoing prohibitions or restrictions, other than the last-mentioned prohibition, and the restriction that all goods and commodities must be imported into and exported out of them in *British*-built ships, or in *British* ships owned by his Majesty's subjects, and navigated by a master and three-fourths at least of the mariners *British* subjects.

2. Of the Trade of the Colonies with the Territories of the *United States*.

St. 28 G. 3. c. 6. § 3. Sugar, molasses, coffee, cocoa-nuts, ginger, and pimento, and all goods and commodities which were not prohibited in the year 1788, to be exported into any foreign country in *Europe*, may be exported from the *West India* Islands to the *United States*.

St. 28 G. 3. c. 6. § 1. No goods or commodities may be imported from the *United States* into the *West India* Islands, except tobacco, pitch, tar, turpentine, hemp, flax, masts, yards, bowsprits, staves, heading-boards, timber, shingles, and lumber of any sort; horses, neat-cattle, sheep, hogs, poultry, and live-stock of any sort; bread, biscuit, flour, peas, beans, potatoes, wheat, rice, oats, barley, and grain of every sort, being the growth or production of any of the territories of the *United States*.

§ 12. 14. No goods or commodities may be imported from the *United States* by sea or coastwise into the province of *Quebec*, or the countries or islands within that government, or up the river *St. Lawrence*, nor at all into the provinces of *Nova Scotia* or *New Brunswick*, the islands of *Cape Breton*, *St. John's*, or *Newfoundland*, or any country or island within their respective governments.

St. 33 G. 3. c. 50. § 14. Except pitch, tar, and turpentine, the growth and production of the *United States*, which may be imported from any of the territories of those states into the provinces of *Nova Scotia* and *New Brunswick*, in *British*-built vessels, owned and navigated by *British* subjects.

St. 28 G. 3. c. 6. § 13. Except also that the governors of *Nova Scotia*, *New Brunswick*, the islands of *Cape Breton*, and *St. John's*, may, in cases of publick emergency and distress, authorize the importation of scantling, planks, staves, heading-boards, shingles, hoops, or squared timber of any sort; horses, neat-cattle, sheep, hogs, poultry, or live-stock of any sort; bread, biscuit, flour, peas, beans, potatoes, wheat, rice, oats, barley, or grain of any sort, for a limited time; and the governor of *Newfoundland*, being empowered by order of his Majesty in council, may authorize, in case of necessity, the importation of bread, flour, *Indian* corn, and live-stock, for the then ensuing season only.

Goods and merchandize, being the growth or production of any of the territories of the *United States of America*, may be imported directly from thence in *British*-built ships, owned by *British* subjects, and navigated according to law, or in ships built in the countries belonging to the *United States*, owned by such subjects, and navigated by a master and three-fourths of the mariners of those countries; namely, unmanufactured goods and merchandize, (except fish-oil, blubber, whale-fins, and spermaceti); and also tobacco, pig-iron, bar-iron, pitch, tar, turpentine, rosin, potash, pearl-ash, indigo, masts, yards, and bowsprits, upon the same duties as if they came from any *British* island or plantation in *America*. Secondly, Fish-oil, blubber, whale-fins, spermaceti, and all other goods and merchandize (except snuff), upon the lowest of the duties imposed by law upon those articles, if they came from countries not under the *British* dominion. Thirdly, Snuff upon the same duties as if it was the product and manufacture of *Europe*.

and F, of the consolidation act, 27 G. 3. c. 13. and those enacted by any law passed subsequent touching the duties in these schedules. Snuff is further to be subject to the regulations of stat. 29 G. 3. c. 68.

This stands upon the order of council of 1st April 1792, made by virtue of st. 23 G. 3. c. 39. continued by st. 36 G. 3. c. 38. The duties to be taken on the second class of goods and merchandize are those contained in the tables and schedules A, D,

2. Of the Trade with *Asia*, *Africa*, and *America*.

No goods or commodities of the growth, production, or manufacture of *Asia*, *Africa*, or *America*, may be imported into *Great Britain*, in any other than in *British*-built ships, or in *British* ships owned by his Majesty's subjects, and navigated by a master and three-fourths at least of the mariners *British* subjects.

Except such goods and commodities of the growth or production of the *United States*, as are permitted by the before mentioned order in council to be imported in ships belonging to the *United States*.

which are given as exceptions under the next head of exceptions, are exceptions also to this, as far as they relate to ships.

St. 12 Car. 2. c. 18. § 3.

This is the only direct exception; but some of the instances

No goods or commodities of the growth, production, or manufacture of *Asia*, *Africa*, or *America*, may be shipped or brought from any other place or country, but only from those of their growth, production, or manufacture, or from those ports where they can only, or are, or usually have been, first shipped for transportation.

with *Asia*, *Africa*, and *America*; and is founded on the construction of the fourth section of the act of navigation.

This restriction applies as well to the trade with the plantations, as the general trade

Except the commodities of the *Streights* or *Levant* seas, from the usual ports of lading them within the *Streights* or *Levant* seas (a); *East India* commodities, from the usual ports for lading them to the southward and eastward of the *Cape of Good Hope* (b); the goods of the *Spanish* or *Portuguese* plantations or dominions, from the ports of *Spain* or *Portugal*, or the *Western Isles*, commonly called *Azores*, or the *Madeira* or *Canary Islands* (c); all bullion and prize-goods, from any port in any sort of ships (d);

(a) Stat. 12 Car. 2. c. 18. § 12.

(b) § 13.

(c) § 14.

(d) § 15.

- (a) Stat. 7 Ann. c. 8.
 (b) Stat. 14 G. 2. c. 36.
 (c) Stat. 13 G. 1. c. 15. ft.
 7 G. 2. c. 18.
 (d) Stat. 5 G. 3. c. 30.
 (e) Stat. 16 G. 3. c. 52. 15 G. 3. c. 35. (f) Stat. 27 G. 3. c. 19.
- jesuits bark, sarsaparilla, balsam of *Peru* and *Tolu*, and all drugs the produce of *America*, from the *British* plantations (a); raw silks or other goods of *Persia*, from any place belonging to the Emperor of *Russia*, in *British*-built ships (b); cochineal and indigo, from any port, in *British* ships, or ships of a state in amity (c); gum senega, coarse printed callicoos, cowries, arangoes, and other *East India* goods, prohibited to be worn here, from any port in *Europe*, in *British*-built ships (d); cotton-wool, and goat-skins, raw or undressed, from any place, in *British*-built ships (e); and goods the merchandize of the dominions of the Emperor of *Morocco*, from *Gibraltar*, in *British* ships (f).

3. Of the *European* Trade.

St. 12 Car. 2. c. 18. § 8. amended by ft. 27 G. 3. c. 18. § 10.

No goods or commodities of the growth, production, or manufacture of *Europe*, hereinafter enumerated and described, namely, no goods or commodities the growth, production, or manufacture of *Muscovy*, or of any territories belonging to the Emperor of *Russia*; nor any sort of masts, timber, or boards; no foreign salt, pitch, tar, rosin, hemp, or flax, raisins, prunes, olive-oils; no sorts of corn or grain, sugar, pot-ashes, wines, vinegar, or spirits called aquavitæ, or brandy-wine; may be imported but in *British*-built ships, or in *British* ships owned by his Majesty's subjects, and navigated by a master and three-fourths at least of the mariners *British* subjects, nor any currants or commodities of the growth, production, or manufacture of any country belonging to the *Turkish* empire, may be imported but in *British*-built ships, owned by *British* subjects, and navigated by a master and three-fourths at least of the mariners *British* subjects; or in ships of the built of any country or place in *Europe* under the dominion of the sovereign or state in *Europe* of which such goods are the growth, production, or manufacture; or of the built of such port where the said goods can only be, or usually are, first shipped for transportation, and navigated by a master and three-fourths at least of the mariners of that country, place, or port.

Stat. 13 & 14 Car. 2. c. 11. § 23.

No sort of wines (other than *Rhenish*), no sort of spicery, grocery, tobacco, pot-ashes, pitch, tar, salt, rosin, deal boards, fir timber, or olive-oil, may be imported from the *Netherlands* or *Germany*, upon any pretence, in any sort of ships or vessels whatsoever.

(g) Stat. 6 Geo. 1. c. 16.
 (h) Stat. 22 Geo. 3. c. 78. § 2. amended by stat. 27 Geo. 3. c. 19. § 10.

Except timber, fir planks, masts, and deal boards, the production of *Germany*, from any port or place in *Germany*, by *British* subjects, in *British*-built ships (g); and wines (h), the growth or production of *Hungary*, the *Austrian* dominions, or any part of *Germany*, from the *Austrian Netherlands*, or any port or place belonging to the Emperor of *Germany*, or the House of *Austria*, in any such ships or vessels as are described in the preceding clause.

Bullion and prize-goods, and all other goods and commodities, of the growth, production, or manufacture of *Europe*, (not prohibited absolutely to be imported,) may be imported from any country, place, or port, in any sort of ships, owned and navigated in any sort of manner: for bullion and prize-goods are excepted by the fifteenth section out of all the provisions of the act of navigation; and what is not prohibited by statute must of course be open and free.

4. Of the Coasting Trade.

No person may lade or carry on board any ship or vessel, other than a *British*-built ship, or a *British* ship owned by *British* subjects, and navigated by a master and three-fourths at least of the mariners *British* subjects, any commodities, or things, of what kind soever, from one port or creek of *Great Britain* or *Ireland*, or of the islands of *Guernsey* or *Jersey*, to another port or creek of the same, or any of them.

Every foreign-built ship or vessel bought and brought into *Great Britain*, to be employed in carrying goods and merchandize from port to port, is to pay at this port of delivery, for every voyage, five shillings *per* ton, over and above all other duties.

5. Of the Fisheries.

Fresh fish of every kind, caught by the crew of any *British*-built ship or vessel, owned by *British* subjects, usually residing in *Great Britain*, *Ireland*, *Guernsey*, *Jersey*, or *Man*, and navigated by a master and three-fourths at least of the mariners *British* subjects, may be imported in such ships free of duty.

No sort of fish whatever of foreign fishing (except eels, stock fish, anchovies, sturgeon, botargo or caveare, turbot, lobsters, and oysters) may be imported into *Great Britain*. enforced by stat. 9 G. 2. c. 33.; and stat. 26 G. 3. c. 81. § 43, 44. Oysters are not specially excepted in any statute; but there is a duty on them in the consolidation act, which, not being leviable on *British*-caught fish, must be construed as a permission to import foreign-caught oysters.

Perpetual bounties are payable on the export of pilchards or shads, cod-fish, ling, or hake, whether wet or dried, salmon, white herrings, red herrings, and dried red sprats, being of *British* fishing and curing.

Temporary bounties are payable on the tonnage of ships carrying on the *British* and the *Greenland* fisheries; on the quantity of fish taken in the *British* and the *Newfoundland* fisheries; on the quantity of oil, head-matter, blubber, and whale-fins, taken in the *Southern* whale-fishery; and on the export of pilchards, seal skins, head-matter, blubber, and whale-fins, taken in the *Newfoundland*, *Greenland*, and *Southern* whale-fisheries, may be imported free of duty, provided *British* ships are employed, owned by *British* subjects usually residing in the king's *European* dominions, and navigated

amended by 29 G. 3. gated by a master and three-fourths at least of the mariners usually residing in the king's *European* dominions.
 c. 53.
 31 G. 3. c. 43. 32 G. 3. c. 22. as to the Greenland fishery; stat. 26 G. 3. c. 26. as to the Newfoundland fishery; stat. 26 G. 3. c. 50. continued by stat. 35 G. 3. c. 92. as to the Southern whale-fishery.

6. Of *British* Ships.

§t. 26 G. 3. A BRITISH-BUILT ship is such as has been built in *Great*
 c. 60. § 1, *Britain* or *Ireland*, *Guernsey*, *Jersey*, or the *Isle of Man*, or in some
 2. of the colonies, plantations, islands, or territories in *Asia*, *Africa*, or *America*, which at the time of building the ship belonged to, or were in the possession of, his Majesty; or any ship whatsoever which has been taken or condemned as lawful prize.

But such *British*-built ships as shall be rebuilt or repaired in any foreign port or place, to an amount exceeding fifteen shillings *per* ton, shall not be considered as *British* built, unless such repairs shall be proved to have been necessary to enable the ship to perform her voyage.

A BRITISH ship is, FIRST, such as is foreign built, and before 1st May 1786 belonged wholly to any of the people of *Great Britain* or *Ireland*, *Guernsey*, *Jersey*, or the *Isle of Man*, or of any colony, island, plantation, or territory in *Asia*, *Africa*, or *America*, in possession of his Majesty. — SECONDLY, such as has been built or rebuilt on a foreign-made keel or bottom, and registered before 1st May 1786, as a *British* ship. — THIRDLY, such as had begun to be repaired or rebuilt on a foreign-made keel or bottom before 1st May 1786, and has since been registered by order of the commissioners of the customs in *England* or in *Scotland*.

26 G. 3. Every ship or vessel having a deck, or being of the burden of
 c. 60. fifteen tons, and belonging to a subject in *Great Britain* or *Ire-*
 § 3. 28. *land*, *Guernsey*, *Jersey*, or the *Isle of Man*, or any colony, planta-
 tion, island, or territory, to his Majesty belonging, must be re-
 gistered by the person claiming property therein, who is to obtain
 a certificate of such registry in the port to which the ship or vessel
 properly belongs; and the certificate is to distinguish the ship or
 vessel under one of these two classes; CERTIFICATES OF BRITISH
 PLANTATION REGISTRY; or, CERTIFICATES OF FOREIGN SHIPS
 REGISTRY FOR THE EUROPEAN TRADE, BRITISH PROPERTY.

§ 5. The port to which a ship shall be deemed to belong, is the port
 from and to which she usually trades, or, being a new ship, shall
 intend to trade, and at or near which the husband, or acting and
 § 6. managing owner, usually resides. No ship, the property of the
 king or royal family, nor any lighters, barges, boats, or vessels, of
 any built or description whatever, used solely in rivers or inland
 § 7. navigation, need be registered; and no ship built in the *United*
States, or owned by the people thereof, during the time the pro-
 hibitory acts were in force, and not before registered, is entitled
 to be registered, unless it has been condemned as prize, or having
 been stranded shall have been built or rebuilt, and registered in
 § 8. the manner before practised and allowed. No subject, whose
 usual residence is out of the king's dominions, shall, during such
 residence,

residence, be entitled to be owner in whole or in part of a *British* ship to be registered under this act, unless he is a member of some *British* factory, or agent for, or partner in, any house or copartnership actually carrying on trade in *Great Britain* or *Ireland*.

An oath is to be taken before the person making the registry § 10. and granting the certificate by the owner; and, if there are two joint owners, by both, if they both live within twenty miles of the port, otherwise by one: if more than two, then by the greater part, not exceeding three, if such greater number of them are resident within twenty miles of the port; or by one, if all shall be resident at a greater distance; and where one of three joint owners takes the oath, he is also to swear, that those who are absent are not resident within twenty miles of *London*, and have not wilfully absented in order to avoid the oath, or are prevented by illness.

No ship is to be permitted to clear out as a *British*-built ship, § 32. or a *British* ship, or to be entitled to the privileges of a *British*-built ship, or a *British* ship, unless the owner has obtained a certificate of registry; and any ship departing from port without being so registered, and obtaining such a certificate, shall be forfeited.

All ships not entitled to the privileges of a *British* built ship, or a *British* ship, and all ships not registered as aforesaid, are deemed, although they may belong to *British* subjects, to all intents and purposes, alien or foreign ships. St. 27 G. 3. c. 19. § 13.

As often as the property of a ship is transferred from one *British* subject to another, in whole or in part, the certificate of the registry is to be truly and accurately recited in words at length in the bill or other instrument of sale, otherwise the bill of sale is to be void. St. 26 G. 3. c. 60. § 17. This clause of the act is general, and applies to a transfer of

ships at sea; and if the requisitions of it are not strictly complied with, the vendee, or person claiming under the bill of sale, has neither a legal, nor equitable, interest in the ship. *Rolleston v. Hibbert*, 3 Term Rep. 406. *Hibbert v. Rolleston*, 3 Br. Ch. Ca. 371. *Camden v. Anderson*, 5 Term Rep. 709.

As often as the master of a ship is changed, a memorandum § 18. thereof is to be indorsed on the certificate by the proper officer of the customs.

The owner is to cause the name by which the ship is registered § 19. to be painted on a conspicuous part of the stern; and such name is not to be changed.

If a certificate of registry is lost or mislaid, or, if a ship shall be altered in form or burden, or from any denomination of vessel to another, by rigging or fitting, she must be registered *de novo*, and a new certificate granted. § 22, 23.

Masters of ships are, on demand, to produce their certificates § 34. to the principal officer in any port within the king's dominions, or to the *British* consul or chief officer in any foreign port.

A ship had originally been registered, and was said to be bought by *Macneal* at *Savannah* in *South Carolina*. Having taken in a cargo there, he sailed for *Nassau*, where he applied to the governor for Macneal's case. Reeves' Shipping, for 501.

for a register. The officer whose duty it was to make out the certificate of registry, alleged that he had no printed forms left, but that he was ready to make an indorsement upon the old certificate, on *Macneal's* taking the oath prescribed by stat. 26 G. 3. *Macneal* afterwards sailed to *Savannah*, and returned again to *Nassau* with a cargo, where the ship was seized; but on a hearing in the court of Admiralty, she was released as not forfeited.

On the part of *Macneal* it was now contended, that the sale of a *British* ship in a foreign port was not an act forbidden by any law; that he did all in his power to obtain a fair and legal registry; that it was a blunder in the collector not to give him a certificate, alleging he had no printed forms; that on his return to *Nassau* he meant to renew his endeavours to obtain a registry, his intention being to trade between *Nassau* and *Savannah*; and that in the case of a change of property in a foreign port, he was left at large as to the *proper* port for the registry of the ship; and having declared his intention to trade thereafter from *Nassau*, that, and that only, became the *proper* port where the ship should be registered.

Lord Cam-
den.

Upon which it was observed by the Lord President, how material it was to ascertain, in cases where a ship was sold, whether in a foreign or *British* port, what shall be the port to which such ship shall be said to *belong*, and within what space of time she shall repair to such port? For if it should be once laid down that such a ship might register in any other port than that where she was first registered, he was satisfied the act of the 28th of the king, which, he said, is founded upon the best principles, and is wisely and sagaciously contrived by the noble person who was the author of it to prevent the many frauds committed under the act of King *William*, would be wholly disappointed of its effect.

He then considered the defects in stat. 7 & 8 *Will.* 3. the frauds that were committed under it, and to what those frauds were owing. It directs, that in all cases of change, whether of the name or the property of the ship, if in another port, it should be registered *de novo*; but in neither case does the act give any direction to point out the particular port where such ship should be registered. The consequence of this want of provision in the act had been the multitude of frauds that were continually practised in the registry of ships; for in any port whatsoever, if a person presented himself and took the oath required by that act, he was entitled to have the ship registered. For it was remarkable, that the act required no other security than the transient oath, as he called it, of any man whatsoever who chose to offer himself, and who the next minute might slip away and never be heard of afterwards. He said, he did not wonder that the noble person who framed the statute of the 26th of the king considered these frauds, and the preventing of them, as particularly deserving his attention; and he was very happy to say, that if they were right in the judgment they were then going to give, he believed they should so fully second the design of this act, that he would defy any man finding a loop-hole to evade it.

He

He thought that stat. 26 G. 3. was an act which in every view of it should be considered as a remedial act ; it was for preventing a publick mischief, to amend and alter stat. 7 & 8 Will. 3. It had appeared that frauds without number were committed under that act ; and that was, and was stated to be, the reason of making this act.

The rule, therefore, of construction in applying and explaining the act, should be such as will most aid in advancing the means of relief and in suppression of fraud. And should it be considered in any light as a penal act, he was clearly of opinion, that every thing arising from such a consideration should be controlled by the other character of it as a remedial act.

He observed, that by sect 5. of the act, the port where the registry ought to be made, was expressly defined *the port from and to which she has usually traded* ; and if a new ship, *the port to and from which she intends to trade*. It is essentially necessary, and expressly required, that the husband's or acting owner's residence should be near such port. This circumstance of residence seems to be made the most indispensable requisite in the section. Besides this, there are added securities, controls, surveys of the ship ; all which, if complied with, especially that of residence near the port, it should seem that fraud would be almost impossible.

He forebore making more observations on the act, except only as to one point ; that is, *how long time should be allowed after the change of property in the ship for arriving at the proper port where the ship ought to be registered* : for if the time allowed were indefinite, so that a ship might be trading from port to port without registering, the design and object of the act would be at an end.

It is remarkable, that stat. 7 & 8 Will. 3. specifies no time for new registering ; no more does stat. 26 G. 3 ; but the latter act does in one clause decide what is to be done in a particular case ; and he thought the direction there given might, by analogy, be applied to all cases of a new registry—"or to any other port " in which she can be legally registered by this act." Now there is no case under this act but that of a change of property in a foreign port. Every court before which a case of this sort comes, is to consider *the time*. Common sense and common reason must say, a ship shall be at liberty to navigate without a register, and shall be protected by law, if in the mean time she is using due diligence to reach a port where a register may be obtained. As for instance, suppose a ship is sold at sea, and she is then making a voyage under a charter-party, and the port at which she first arrives after such sale is not a proper port for her registering, he held she would be justified in going to such port ; but that no further delay would be excused, as she ought in convenient time to proceed to the port where she can be registered.

Upon the whole the rule is this : Where the property of a ship is transferred in a foreign port, she must with all due diligence proceed to the proper port where she may be registered : this port must

must be that of which she is, as it were, an inhabitant. This circumstance is a part of the certificate, is a part of the oath, and is essentially necessary to the registry.

Compare *Macneal's* situation with these requisites. He was said to be the purchaser of this ship at *Savannah*; nothing more appears of him: it might fairly be asked, Who is he? Whence comes he? What property has he? what relations? what friends? By his own account he paid only a part of the purchase-money, for the remainder he was to draw on merchants in *Jamaica*: whether those bills were paid or not, does not appear. These merchants, by his account, were to become part owners of the ship; which alone makes his oath incorrect, and brings great suspicion on the whole transaction. He comes to *Savannah* with a cargo belonging to some *American* merchants, but which in the bill of lading is made to belong to *Macneal*; all which was probably a mere colour to give him the credit of the property, in order to enable him to obtain a registry.

He considered it as a fundamental objection to this ship, that *Macneal* had no known residence. He looked upon him as a sea-vagabond; and observed, that he felt he was under the necessity of swearing with care; for in his oath he did not go farther than to say, "he had not been a resident in any country not under the "dominion of his Majesty."

On this single objection, without taking into consideration any other, the court might decide against this ship. But he had thought it proper to give more at large the sense of the court upon the policy of the act, because it is extremely material that its principle should be thoroughly understood; and as to the point in question, if the act was not scrupulously adhered to, he was persuaded the whole of its regulations would be futile and useless. It became the more necessary to be thus explicit, as the Judge below had seemed greatly to have misunderstood the act; declaring, that *Macneal* had offended only against the letter of the act, and not against its spirit. Indeed, said his Lordship, it is in general beyond sea, in our plantations, that the laws of navigation are broke through and evaded; added to which, the application of them is left for a time with governors, collectors of the customs, and other persons not sufficiently conversant with legal matters, who contribute to aggravate such mischiefs by misconstruction and false interpretations of the law.]

Misnomer and Addition.

THE names of men, at this day, are only founds for distinction sake, though perhaps they originally imported something more, as some natural qualities, features, or relations; but now there is no other use of them, but to mark out the families or individuals we speak of, and to difference them from all others; since therefore they are the only marks and *indicia* of things which human kind can understand each other by, we must see what certainty the law requires herein, and what the effects and consequences are of the omission of the name, or false specification of the party; and this we shall do under the following heads:

- (A) What Names are considered as the same.
- (B) What Names and Additions are required by Law, and must be truly inserted: And herein,
 - 1. Of the Difference between the Christian Name and Surname.
 - 2. Of the Addition of the Estate or Degree.
 - 3. Of the Addition of the Mystery.
 - 4. Of the Addition of the Town, Hamlet, Place, or County.
 - 5. Of Additions which are only Conveyances to the Action.
- (C) Where the Name is truly put at first, and afterwards varied from.
- (D) Of the Difference between a Mistake in Grants, Obligations, &c. and Judicial Proceedings.
- (E) At what Time the Mistake must be taken Advantage of, and how the same is saved.
- (F) Of the Manner of taking Advantage of, and Pleading a Misnomer or Want of Addition.
- (G) Who may take Advantage thereof.

(A) What

(A) What Names are considered as the same.

Cro. Jac.
225. 2 Roll.
Abr. 135.
Piers Grif-
fith v. Hugh
Middleton.

IF two names are in an original derivation the same, and are taken promiscuously to be the same in common use, though they differ in sound, yet there is no variance; and therefore where *Piers Griffith* brought an *audita querela*, to which an outlawry was pleaded by the name of *Peter Griffith*, the plea was allowed; for it appears by acts of parliament, that *Piers* and *Peter* have been used promiscuously, as signifying the same person.

2 Roll.
Abr. 135.
Leon. 147.

So, *Saunders* and *Alexander*, *Jane* and *Joan*, *Jean* and *John*, *Garret*, *Gerat*, and *Gerald*, are the same names.

2 Roll.
Abr. 135.
Palm. 71.

But *Ralph* and *Randall*, *Randolphus* and *Randalphus*, *Sibel* and *Isabella*, have been held to be distinct names; and so of others, in which there is a substantial variance in sound, original, and common use.

2 Roll.
Abr. 135.
Vide head
of Amend-
ment and
Jeofail.

So, *Agnes* and *Anne* are different names; and therefore if one declare against *J. S.* and *Agnes* his wife, and on the record of *nisi prius* it is *Anne* his wife, this is a material variance, and not amendable.

2 Roll.
Abr. 136.
3 Keb. 278.
Mod. 107.

If there are two *English* names that are distinct, and one *Latin* name for them both, such name shall serve for both, as *Jacobus* for *James* and *Jacob*, although two distinct *English* names.

(B) What Names and Additions are required by Law, and must be truly inserted: And herein,

1. Of the Difference between the Christian Name and Surname.

Cro. Jac.
558. 640.
Owen, 107.
Dyer, 279.
5 Co. 43.
Poph. 57.
Noy, 135.
Cro. Eliz.
57. 222.

[(a) But if
plaintiff sues
defendant by
the name he
subscribed
to the bond,
&c. and de-
fendant
pleads a
mistake,
plaintiff
may re-
ply he is as
well known by
that name.]

IF the christian name be wholly mistaken, this is regularly fatal to all legal instruments, as well declarations and pleadings, as grants and obligations; and the reason is, because it is repugnant to the rules of the christian religion, that there should be a christian without a name of baptism, or that such person should have two christian names, since our church allows of no re-baptizing; and therefore if a person enters into a bond by a wrong christian name, he cannot be declared against by the name in the obligation, and his true name brought in an *alias*, for that supposes the possibility of two christian names; and you cannot declare against the party by his right name, and aver he made the deed by his wrong name; for that is to set up an averment contrary to the deed; and there is this sanction allowed to every solemn contract, that it cannot be opposed but by a thing of equal validity; and if he be em-pleaded by the name in the deed, he may plead that he is another person, and that it is not his deed (a).

But

But, though persons cannot have two christian names at one and the same time, yet, they may, according to the institution of the church, receive one name at their baptism, and another at their confirmation; for though it allows no re-baptizing to make double names, yet it doth not force men to (a) abide by the names given them by their godfathers, when they come themselves to make profession of their religion.

by the name of Francis. (a) But a person, by taking a new name of confirmation, does not lose his name of baptism. 6 Mod. 115, 116. Salk. 6. pl. 15. 2 Ld. Raym. 1015, 1019.

The mistake of the surname does not vitiate, because there is no repugnancy that a person should have different surnames; and therefore if *John Gape* enters into an obligation by the name of *John Gate*, he may be empleaded by the name in the deed, and his real name brought in by an *alias*, and then the name in the deed he cannot deny, because he is estopped to say any thing contrary to his own deed.

The declaration must be of the name in the obligation, with an *alias* of the real name; for the declaration must shew the cause of complaint as it is; therefore it must in all things follow the obligation, and the intent of the *alias* is only to shew he has been differently called from the name in the obligation; and therefore if a man oblige himself by the name of *J. S. esq.* and afterwards he be made a knight, the plaintiff may declare against *J. S. knight, alias J. S. esq.*

It is said, that a person cannot take advantage of a mistaken surname in an indictment, either by plea in abatement or otherwise, notwithstanding such surname have no affinity with his true one, and he was never known by it. And in this respect, an indictment differs from an appeal, whereof it is certain, that a misnomer of a surname may be pleaded in abatement, as well as any other misnomer whatsoever.

2. Of the Addition of the Estate or Degree.

It seems that the common law in no case required any other description of a person, than by his christian name and surname, unless he were of the degree of a knight or some higher dignity; but the names of dignity were always required, being marks of distinction imposed by publick authority, and therefore making up the very name of the person to whom they are given. And they are of two sorts; 1st, Such marks of distinction as exclude the surname, so that the persons may not seem to be of any common family; and such are the names of earls, dukes, &c. 2^{dly}, Such marks of distinction as are also imposed by the supreme power, and parcel of the name itself, but do not exclude the surname, such as knight, baronet, &c. And these marks of distinction were always to be made use of as part of the name in all legal proceedings; and so curious was the law herein, that if a plaintiff in any action gained a new name of dignity, pending a writ, he made it abateable. But

Co. Lit. 3.
2 Roll. Abr.
135. Judge
Gawdy's
case, who
was christ-
ened by the
name of
Thomas, and
confirmed

3 H. 6. 25.
2 Roll.
Abr. 146.

Dyer, 273.
Bulf. 216.

2 Hawk.
P. C. c. 25.
§ 68.

2 Inst. 665.
2 Roll.
Abr 469.
Show. 392.
Comb. 189.

(a) But it hath been holden, that the dignity of a baronet is not without the statute, because there was no such dignity at the time of the making of it. Sid. 40. Lit. Rep. 81. Cro. Car. 104.

2 Inst. 666. But names of worship, such as esquire, gentlemen and yeomen, since they are only names of distinction in popular use, and not given by the publick authority of the supreme power, the law doth not count them parcel of the name, and therefore were not necessary at common law.

2 Inst. 670. In the time of H. 5. it was perceived, that the christian and surname were not sufficient denominations of persons, and did not sufficiently avoid the confusion that might happen by the mistake of persons; and that an innocent person might, upon a process of execution, be distrained upon having the same name with the real defendant: therefore, by the 1 H. 5. c. 5. it is enacted,

2 Roll. Rep. 225. [This statute is to be taken strictly, and confined to those cases where process of outlawry lies; therefore want of proper addition is not pleadable to an information in nature of a *quo warranto*. Rex v. Brough, 1 Will. 244.]

“ That in every original writ of actions personal, appeals and indictments, and in which the exigent shall be awarded, to the names of the defendants in such writs original, appeals and indictments, additions shall be made for their estate or degree, or mystery, and of the towns or hamlets, or places and counties of the which they were or be, or in which they be and were conversant; and if by process upon the said original writs, appeals or indictments, in the which the said additions be omitted, any outlawries be pronounced, that they be void, frustrate, and holden for none; and that before the outlawries pronounced, the said writs and indictments shall be abated by the exception of the party, wherein the said additions be omitted.”

(a) But it is said to be no fault to give an esquire the addition of gentleman; *Et sic e converso*. Bro. Addition, 44. Esquire and gentleman no variance. Fortesc. Rep. 354.

2 Inst. 665. This law doth not extend to the names of plaintiffs, for they were in no mischief or danger to be mistaken, nor does it extend to real or mixt actions; because here the possessors were empleaded who were sufficiently specified, and so no other mark of distinction is needful; besides, no man can in the process possibly be grieved, because there is no process but of distress upon the land, and no (b) imprisonment at all in these actions.

6 Mod. 85. (b) In an assise, if the disseisin be found with force, so that a *capias pro fine* and exigent lies for the king; yet, because the original is in the realty, the defendant shall have no addition within this act. 2 Inst. 665.—So, there needs none in an inferior court where process of outlawry does not lie. Moor, 354. pl. 478.—Nor needs there any in any action where outlawry does not lie. Bro. Addition, 2.

As to the estate and degree required by the statute to be added, we must observe, that state is defined by the civilians the capacity of moral persons; for, as natural persons have a certain space in which their natural existence is placed, and in which they perform their

their natural actions; so have persons in a community a certain state or capacity, in which they are supposed to exist, to perform their moral acts, and exercise all civil relations; and therefore where one, who is neither by birth, office, creation, or reputation, an esquire or gentleman, is named, with either of these additions; or where a gentleman, by birth, who follows a trade or husbandry, is named with the addition of the trade or husbandry, and not of gentleman*; or where a peer, who has more than one name of dignity, is not named by the most noble; or where a gentlewoman is named spinster, or a yeoman is named gentleman; and such matter is pleaded in abatement, and found for the person who pleads it, the writ shall abate.

and if by his degree, the writ shall not abate unless he shews he has a higher degree. *Stra.* 556. 816. *Ld. Raym.* 1541.

It hath been adjudged to be a good plea in abatement to a writ or indictment against one by the name of *J. S. knight*, that he is a baronet and no knight.

So, in trespass against the defendant by the name of *William Snow*, baronet, who pleaded in abatement, that at the time of the bill purchased he was, and yet is a knight and baronet; and because he is not called knight as well as baronet, he prayed judgment, &c.; upon demurrer to this plea, the court were of opinion that it was good.

So, if a man be empleaded by the name of *J. S.* where he is garter king at arms; this is not good, because it is not only a name of office, but of dignity and grant, made to him by the words, *creamus*, *coronamus*, and *nomen imponimus*, &c.

A bishop may be described by the name of his bishoprick, without the addition of his surname; but a parson must be empleaded by christian and surname, and not *John*, parson of *D.*, because bodies politick are founded by publick authority to political ends; therefore the bishop, the superintendant of the diocese, is made a body politick to subserve all the purposes of government in the care of religion; and it is not thought necessary to give every person such a capacity.

A bishop of an *Irish* diocese may be as well described by the addition of his bishoprick, as an *English* bishop may by the addition of an *English* one; but it seems clear, that no one can be well described by the addition of a temporal dignity in *Ireland*, or any other nation, besides our own; because no such dignity can give a man a higher title here than that of esquire.

The degree of a serjeant at law is certainly a good addition; and so, as is generally holden, is a degree in either university; yet a doctor in divinity may be described by the addition of clerk, as well as by that of doctor. *Armiger*, *generosus*, yeoman, labourer, are good additions of the estate and degree of a man, but not of that of a woman. *Generosa*, widow, single woman, wife of *J. S.* spinster, are good additions of the estate and degree of a woman; and, as some say, spinster*, is a good addition for the estate and

2 *Inst.* 669.
2 *Hawk.*
P. C. c. 23.
§ 103.
* *Sed qu.*
If such exception would now be allowed?
— A trader may be sued by his degree, or by his trade;

Cro. Car.
371. *Jon.*
346.

Carth. 14.
Jeffereys
v. Snow.
Comb. 65.
S. C.

Leon. 249.
Cro. Eliz.
542. *Vide*
Stra. 850.
S. P.

2 *Inst.* 666.

2 *Inst.* 663.
Theol. lib.
6. c. 15.
§ 12, 13.

2 *Inst.* 667.
2 *Hawk.*
P. C. c. 23.
§ 110.

* *Sed. qu. p.*

degree of a man; but neither burghers, citizen, nor servant, are good additions, as being too general.

Salk. 7.
Pl. 16.
2 Hawk.
P. C. c. 23.
§ 106.

If several defendants, of different names, have the same addition, it is safest to repeat the addition after each name; and if a father have the same name and addition with his son, the writ against the son is abateable, unless the addition of *puisne* be added to the other additions: but, if a father alone be a defendant, there is no need of the addition of *eigne*: also, if the son be declared against *in custodia marescalli*, there is no need of the addition of *puisne*, unless the father be also in the custody of the marshal.

2 Leon. 183.
Cro. Eliz.
583.
Dyer, 38.

It hath been held a fatal fault, to apply the addition to the name which comes under the *alias dictus* only, and not to the first name; but it is said not to be material, whether any addition be put to the name which comes under the *alias dictus*, or not; because what is so expressed is not material.

2 Hawk.
P. C. c. 23.
§ 107.

The additions of the estate, degree, and mystery of the party are not sufficient, unless they be the same which he had at the time of the writ. And in this respect, such additions differ from that of place, which is sufficiently shewn, by naming the defendant late of such a place.

2 Inst. 670.
2 Hawk.
P. C. c. 23.
§ 108.
2 Hal. Hist.
P. C. 177.

Also, it must plainly appear that the addition is referred to the party; and therefore it is not well expressed by the addition of his mystery, naming him *B. A.*, son of *A.* of *C.*, butcher; because butcher refers to *A.* rather than to the son.

3. Of the Addition of the Mystery.

2 Inst. 668.

It seems agreed, that the word *mystery* includes all lawful arts, trades, and occupations; and that if one, under the degree of a gentleman, have divers of such arts, trades, or occupations, he may be named by any of them.

2 Hawk.
P. C. c. 23.
§ 114.
2 Hal. Hist.
P. C. 176.

The additions of this kind, which are said to be clearly good, are those of husbandman, merchant, broker, tailor, point-maker, smith, miller, carpenter, cook, brewer, baker, butcher, parish-clerk, mercer, fishmonger, dyer, school-master, scrivener, and such like.

2 Hawk.
P. C. c. 23.
§ 115.

The additions of this kind, which are said to be clearly insufficient, are those of maintainer, extortioner, thief, vagabond, heretick, common informer, and such like.

2 Hawk.
P. C. c. 23.
§ 116.

But the following additions of this kind are said to be questionable:

2 Sed qu. If
this addition is not
now frequently
used, and, as

1st, Farmer*; which by the better opinion seems to be an insufficient addition; because if any mystery be implied in the notion of it, it is that of husbandry, of which husbandman is the proper addition.

being well understood, not objected to?

2 Hawk.
P. C. c. 23.
§ 117.
and several
authorities
there cited.

2^{dly}, Chamberlain, butler, and pantler; which are holden to be insufficient additions, because they denote only a special kind of officer or servant, and imply nothing which, in the common understanding of the words, comes under the notion of a mystery;

tery; and from this ground it seems to follow, that neither groom nor page are good additions; and yet in some of the old books they seem to have been so admitted.

3dly, Hostler; which hath been holden to be a good addition, and seems properly enough to come under the notion of a mystery; and though it hath been resolved, that any one who keeps an inn, may be sued by the addition of a labourer, upon the custom of the realm, for want of due care of the goods of his guests; because whoever keeps a common inn is, in that respect, liable to answer for such defects, by whatsoever addition he may be styled; yet this does by no means prove that such person may not as well be sued by the addition of hostler, but only that he may be sued as well under any other addition.

2 Hawk.
P. C. c. 22.
§ 118.

4. Of the Addition of the Town, Hamlet, Place, or County.

It is a good addition of this kind to name the party late * of such a town; in which respect this addition differs from that of the estate, degree, or mystery; and it is said, that if a defendant be named of *A.* and late of *B.*, it is sufficient to prove either addition.

2 Hawk.
P. C. c. 22.
§ 119.
2 Hal. Hist.
P. C. 175.
* On special
original

against *A. nuper de London*, merchant, he pleaded he had for four years been commorant at *B.*, and traversed that at the time of the writ, *vel nuper tunc, vel unquam postea*, he was of *London*, and made affidavit; but the plea was set aside on motion. *Cortis v. Mienoz*. Stra. 924. [In *Shelly v. Wright*, Barnes, 338. it is said not to be usual to set aside such a plea upon motion; but that the plaintiff ought to demur.]

The addition of place is sufficiently shewn by naming the defendant *de Londino*, or *de Norwico*; but not by naming him *Londini*, or *Bristolie*, for that imports only that he belongs to such town, but not that he lives there; nor by naming him of a town which is not a county of itself, without shewing the county. If it name him of a parish which contains several towns, he may plead such matter in abatement; for the statute says, that the addition shall be of the town or hamlet; but a parish shall be intended to contain no more than one town, unless the contrary be shewn.

2 Inst. 669.
Dyer, 212.
Cro. Jac.
167
2 Hawk.
P. C. c. 23.
§ 120.

If there be two towns in a county, the one called *Great Dale*, the other *Little Dale*, and the defendant be named only of *Dale*; he may plead, that there are two *Dales* in the county, called *Great Dale* and *Little Dale*, and none without an addition; and as some say, he may plead that there is no such town as *Dale*, either in this case, or where there is but one town called *Little Dale*, and he is named of *Dale*.

2 Hawk.
P. C. c. 23.
§ 121.

If a defendant live in a hamlet, which is so far part of a town, that those who live in it are indifferently styled sometimes of the hamlet, and sometimes of the town; it seems to be in the election of the plaintiff, to name him either of the hamlet or of the town.

2 Hawk.
P. C. c. 23.
§ 122.

If a defendant live in a place known by a special name, out of a town or hamlet, he may be named of such place.

2 Hawk.
P. C. c. 23.
§ 123.

2 Hawk.

P. C. c. 23. of the husband*.

§ 124.

* The place where defendant is *conversant* is sufficient, though not *commerant* nor inhabitant. Barnes, 162.

5. Of Additions which are only Conveyances to the Action.

Vide tit.
Executors
and Admi-
nistrators.

When any particular character or relation gives any person rights and privileges, or makes him subject to any burden; to demand the one, or be liable to the other, the particular character or relation ought to be set forth; for since it is the cause of the action, it must certainly be material; and therefore when persons sue or are sued, as heirs, executors, or administrators, they must be named as such, for these are necessary conveyances or inducements to the action, which if mistaken is fatal.

Vide tit.
Heir and
Ancestor.
Cro. Eliz.
333.

But, where the inducement is not necessary, but surplusage only, as, if an action of detinue of charters be brought against *J. C.*, and the writ be *præcipe J. C. filio & heredi* of *R. C.* and he count of a bailment to the defendant himself; the defendant plead, that he was son and heir to *W. C.* and not to *R. C.*, this is no good plea, because he is charged with an injury done by himself. But, if he had been charged upon any covenant of his ancestors, as their representative, there, the periphrasis, or inducement, must have been rightly formed; for otherwise the plaintiff doth not entitle himself to his action; and, there, this had been a good plea.

Saund. 111.
D. an v.
Guile.

If this inducement be not at first in a declaration, yet if it afterwards appear, that the party is charged as executor, this is sufficient; as, if an action of covenant be brought against *J. S.* executor, and he be not named at first *J. S.* executor of the last will and testament; but afterwards it be shewn, that the testator did covenant and bind himself his executors, &c. and made *J. S.* his executor, and died; and a breach be assigned; this is sufficient, without a formal nomination.

2 Inst. 666:

If an action of account be brought against a parson, they need not call him parson of *Dale*; but, if an assize be brought against a parson or prebend, for land that he hath in right of his church, he must be named parson or prebendary of the said church.

Vide head of
Privilege.

So, if an attorney of the Common Pleas bring a writ of debt, he need not name himself attorney; but if he bring a writ of privilege, he ought.

(C) Where the Name is truly put at first, and afterwards varied from.

Cro. Eliz.
913. Law
v. Saunders.

THE name must be truly put at first; for if that be omitted, there is a complaint against no person; therefore, where, in an *assumpsit*, *J. Law* declares thus; *J. L. queritur de Thom. Saunders, &c. cum in consideratione quod idem J. L. would marry the daughter of the said Thomas Saunders, super se assumpsit* to pay him 100*l.*, the declaration is bad, though after a verdict; because it

it does not say *prædict.* Thom. Saunders *super se*, &c. for no body is expressly charged with assuming; and when it is indifferent whether there can be an injury, or no, it is not by the court to be supposed *.

* But as the pleadings are now in English, the pronoun *he*

would have been used, and, referring to the last antecedent, would have been sufficient.

But if the plaintiff counts against *J. S. quod præd. J. S.* was seised of the manor of *Dale*, without saying *prædict. J. S.* or *de manerio prædict.*; this, after a verdict, shall be taken to be so; for he being named to be seised, and this by verdict being found, it is necessary it should be intended *J. S.* mentioned, for here it cannot possibly be taken indifferently either way.

Cro. Eliz. 192. Watts's case.

If *J. W.* declares against *T. W.* and the judgment is *quod prædict. T. recuperet*, *T.* shall be amended and made *John*; and note, that by the statute 16 & 17 Car. 2. c. 18. it is expressly provided, that judgment shall not be reversed for any mistake in christian name, or surname, in any declaration, plaint, or pleading.

Hob. 327. Cro. Jac. 662. Cro. Eliz. 865. Vide tit. Amendment and Jeofail.

But this must be understood where the record is before them, for otherwise it may be very fatal to a just cause; as, if *A.* brings an *assumpsit* against *B.* and declares he was bail for him at the suit of *W. Adderly*; and the defendant assumed to save him harmless, and that the plaintiff was taken in execution, and paid the debt; upon *non assumpsit* pleaded it was found, that the defendant was arrested by the same *William Adderly*, but that he declared against him by the name of *William Adderby*, and the plaintiff became bail for him, &c. In this case the opinion of the court was, that the defendant was not chargeable; for *Adderby* and *Adderly* shall not be intended the same person, at whose suit the plaintiff became bail; for the verdict hath no credit against a record, and therefore it cannot reconcile the difference that appeared to be between the records; but in this case, if it had been before the court, it might have been amended.

Cro. Eliz. 459. Francon v. Delamere.

If the surname in the judgment differs from the surname in the declaration, yet it shall be amended; for in the judgment the christian name need only be mentioned, and the surname is redundant, and then *utile per inutile non vitiatur*; as, if a declaration be against *John Morgan Wolf*, and the judgment be against *John Morgan*, this is well enough: so, if a declaration be *Henry Skinner*, and judgment be entered *quod Henricus Soiner recuperet* 10*l.* assessed by the jury, and 5*l.* *eidem Henrico Skinner de incrementis*, this is well enough.

Cro. Eliz. 865. Hob. 327. Cro. Jac. 632.

The variance of the surname in the process to the sheriff destroys not the verdict; otherwise it is in the variance of the christian name; for, when any man is named by two different surnames on record, it shall be intended he has two different surnames, as by law he may have; therefore, if a *venire facias* be to one by the name of *George Thompson*, and in the *disringas* he be named *Gregory Thompson*, and he appear and be sworn, the verdict is not good; but if there be two different surnames in the record, they shall be intended his real names, and then the verdict shall not be avoided; as, if a man be named in the *venire facias*, *Thomas*

Cro. Eliz. 57. Depty v. Sprat.

Barker of B., and in the *disfringas*, *Thomas Carter of B.*, and he appears and is sworn, and tries the issue, the verdict is good notwithstanding.

Roll. Abr.
196.
3 Bulf. 18.
Hob. 64.
Brownl.
174.

So, if the christian name be wrong in the *disfringas*, or in the panel returned, or in the panel of the jury sworn, if it can be proved to be the same man that was intended to be returned in the *venire*, having there his right christian name, it may be amended,

(D) Of the Difference between a Mistake in Grants, Obligations, &c. and Judicial Proceedings.

Co. Lit. 3.
Dyer, 279.
Pl. 9. Cro.
Jac. 558.
Owen, 107.

IF the christian name be wholly mistaken, this, as hath already been observed, is not only fatal in judicial proceedings, but also in grants, obligations, &c. and therefore if *Edward* obliges himself by the name of *Edmund*, it is ill.

Co. Lit. 3.
2 Roll.
Abr. 43.

But in grants, &c. if there be such sufficient marks of distinction, that the grant would be good without any name at all, there, a mistake of the christian name or surname, being only surplussage, will not vitiate, according to the rule *utile per inutile non vitiatur*; and therefore a grant to *George* Bishop of *Norwich*, where his name is *John*: or to *Henry* Earl of *Pembroke*, where his name is *Robert*, is good (a).

[(a) So, in judicial proceedings.
1 Str. 316.]
Co. Lit. 3.
2 Roll.
Abr. 43.

So, a grant to a man and his wife is good, without naming her by the name of baptism: so, if a grant be made to *T.* and *Elen* his wife, where, in truth, her name is *Emlyn*, yet the grant is good; for being called the wife of *T.* reduces it to a sufficient certainty.

Leon. 18.
Fide tit.
Devise.

So, in a devise, though the christian name be mistaken, yet, if there be a sufficient specification of the party, the devise is good; because it must be construed according to the intent of the devisor; and therefore if a devise be made to *Abraham*, the eldest son of *B.*, where his name is *William*, this is a good devise.

Co. Lit. 3.

But in pleading, in these cases, the christian name ought to be shewn; for the death of the individual is a good plea in abatement, which often falls out where the same office, dignity, or relation continues in another.

Perk. § 37.

If there be father and son of the same name, and the father grant an annuity by his name, without any addition, it shall be intended the grant of the father; and if the son, being of the same name with his father, grant an annuity, without any addition, yet the grant is good, for he cannot deny his own deed.

2 Roll.
Abr. 44.

If *A.* be created an herald, and in the patent he be called *Chester*, a grant or obligation made to him by the name of *Chester*, is good; for this sufficiently distinguishes him from other men.

Cro. Jac.
374.

If a grant be made to a father and his son, he having but one son, the grant is good for the apparent certainty of it: but, if the father has several sons, or, if a grant be made to a man's cousin, or friend, these are void for uncertainty.

If J. S. reciting by his deed, that his name is J. S. by the same deeds grants an annuity by the name of Tho. S., this is a good grant; for the writ shall be brought upon the whole deed. Perk. §40.

So, if J. S. knight, reciting by his deed, that he is a yeoman, grants an annuity, the grant is good. Perk. §43.

A grant to a duke's eldest son by the name of a marquis, or to the eldest son of a marquis by the name of an earl, &c. is good, because of the common courtesy of England, and their places in heraldry. Carth. 400.

So, where a conveyance was made of a reversion to Ralph Evers, knight, Lord Evers, and he brought an action of covenant, to which the defendant pleaded, that at the time of the grant he was not *cognitus & reputatus per nomen m.*, it was held to be no good plea; for the person is sufficiently expressed by Lord Evers, and the addition of knight, though false, shall not take away the description of the true person. Bull. 21. Cro. Car. 24c. Lord Evers v. Strickland.

But it was adjudged in C. B., and affirmed by three judges in B. R., where the party set forth his title to an advowson, by virtue of letters patent granted to A., *tunc miligero & postea militi*, and upon oyer of the letters patent it appeared, that the grant was made to A., knight, that it could not be intended the same person, because knight is a name of dignity, but *ar. ger*, or esquire, a name of worship; and if he is afterwards made a knight, the name of esquire is thereby extinguished, and consequently, that a grant made by the king to A., knight, when there was no such man a knight, was a void grant. Carth. 440. 5 Mod. 297. 2 Salk. 560. pl. 3. The King v. Bishop of Chester. But Rokeby, Justice, held, that he might take by a grant made unto him.

by the name of knight, & sic vice versa, si constat de persona, ut res movetur, &c. — And now, this judgment was reversed in parliament, because it was only a mistake in truth a knight at the time of the grant. Carth. 440. pleader, the party being in

(E) At what Time the Mistake must be taken Advantage of, and how the same is solved.

IT seems agreed, that he who would take advantage of a misnomer, or the want of a proper addition, must do it before he pleads to issue; for the addition is ordained by the statute, that the party who happens to be outlawed may have notice; but, if he appears and takes no exception, *constat de persona*, and he thereby waives any benefit he may have by the misnomer or want of addition. 175. Sid. 247. Keb. 885. Show. 394. Comb. 188. Carth. 207. Lil. P. C. 509. Roll. Abr. 780. Cro. Jac. 609. Roll. P. 225. n. 1. 2 Hal. P. C.

The defendant was served with process by the name of Dubois, plaintiff entered an appearance for him, and obtained judgment by default; and on motion to set aside the judgment, upon an affidavit that his name was Davois, the court refused it and said, that such kind of motions would destroy all pleas in abatement; since the last act enabling the plaintiff to appear for the defendant, his appearance by the name of Dubois is the same, as if entered by the defendant himself*.

and plaintiff declares against him by that name, the court will not, on motion, stay proceedings for irregularity, but leave defendant to plead variance. — So, if it is in the addition, of his degree or mystery. 2 Will. 293. Pass. 7 Geo. in B. R. Halcock v. Dubois. * If defendant is served by a wrong name, appears by his true name,

(F) Of the Manner of taking Advantage of, and Pleading a Misnomer or Want of Addition.

Finch. 363. **A**lthough a defendant may, by pleading in abatement, take advantage of a misnomer when there is a mistake in the writ or declaration, as to the name or baptism or (a) surname, yet in such a plea he must set forth his right name, so as to give the plaintiff a better writ.

19 H. 5. 1. Pl. 3. (a) That the safest way in criminal cases, is to allow the party's plea of misnomer, both as to his surname and as to his christian name; for he that pleads misnomer for either, must in the same set forth what his true name is, and then he concludes himself; and if the grand jury be not discharged, the indictment may presently be amended by the grand jury, and returned according to the name he gives himself. 2 Hal. Hist. P. C. 176. — That the party accused may take advantage of the misnomer, or want of addition, but yet he must plead over to the felony; but though such plea be found for him, he is not to be discharged, but must be indicted over again; neither shall such plea, found against him, be peremptory, but he shall be tried on his plea in chief. 2 Hawk. P. C. c. 34.

Gouldsb. 36. Skin. 620. pl. 4. Salk. 6. pl. 15. 4 Mod. 347. Hal. Hist. P. C. 175. Also, he who pleads in abatement, must not only set forth his right name, but must also allege, that by such name he was known and called at the time of the purchase of the writ.

He who will take advantage of the misnomer of his christian name, addition or surname, must do it upon his arraignment, and the entry must be special, viz. *super quo venit Robertus Williams, qui indictatur per nomen Johannis Williams, & dicit quod ubi in indictment proponitur quod quidam Johannes Williams, vi & armis, &c. Ipse nomen est Robertus & non Johannes*; for if he should say, *venit & predictus Johannes Williams*, he concludes himself, and cannot plead that his name is *Robert*.

Carth. 207. Tallent v. Germyn. So, *predictus J. Germyn* (with an *n* at the end) *venit & defendit*, for that his name is *Germyn* (without an *n*) and not *Germyn &*, &c., and upon demurrer to this plea it was adjudged against him; for that he had admitted his name to be *Germyn*, by his appearing and making defence by that name; but that if he would have taken advantage of the misnomer, he should have pleaded in this manner, *& Johannes Germyn, qui per nomen J. Germyn superius implacitatur, venit & dicit quod*; for this default a *respondeas ouster* was awarded.

M. 2. c. R. number v. Cotteral. So, where the defendant was sued by the name of *Edward Cotteral*, and pleaded in abatement that his name was *John*, but introduced his plea, and the aforesaid — *Cotteral* (leaving out his christian name) comes and defends the force and injury, when, and so forth; it was held, that the defendant saying *& predictus Cotteral*, must be understood *& predictus Edwardus Cotteral*, by which he confesses his name to be *Edward*; and if he would have taken advantage of the misnomer, he should have said *& Johannes*, who was sued by the name of *Edward*.

Trin. 10 Geo. 2. in B. R. Read v. If there be a mistake in the christian name and surname, the defendant may take advantage of both, and his plea on that account shall not be held to be double; as, where trover was brought

brought against the defendant by the name of *Christopher Mature*, and he pleaded in abatement, that his name was *John Metter*, and that he was known by that name; *absque hoc*, that he was named by the name of *Christopher Mature*; on demurrer to this plea, because of duplicity, and because no *venue* was laid where he was baptized, it was held, 1st, That there being a mistake in both names, the defendant could not take advantage thereof, in a better manner than he has done; for he is not bound to admit one of the names right, which if he did, he would not then give the plaintiff a better writ, the *pranomen* and *cognomen* being only one description of the same person; and though there is no precedent, where misnomer has been pleaded both in the christian name and surname, yet that may be because it is a matter that has rarely happened; and for this were cited 1 *Lutw.* 10. *Thom. Ent.* 1. 1 *Salk.* 6. 2dly, That there was no necessity of laying a *venue*, this being a matter relating to the person, which must be tried where the action is laid; and for this were cited *Raff. Ent.* 29. *Hern's Plead.* 9. 1 *Salk.* 6. 6 *Mod.* 115.

Mature.
Cafes temp.
Hardw. 286.
S. C.

(G) Who may take Advantage thereof.

THE defendant, though his name is mistaken, is not obliged to take (a) advantage of it; and therefore if he be empleaded by a wrong name, and afterwards empleaded by his right name, he may plead in bar the former judgment, and aver, that he is *una & eadem persona*.

(a) J. Villars, who pretended himself to be Earl of Buckingham,

was arrested by the name of J. Villars, armiger; and, on motion, the court gave him leave to put in bail, without joining in the recognizance, and thereby not estop himself. *Salk.* 3. pl. 7. pl. 17. 7 *Mod.* 38.

So, if a person be indicted and acquitted of a crime, and afterwards be indicted for the same offence, in which second indictment the crime is described to be the same in substance, with some variation of the name, addition, &c., he may make good the variance, by averring, that he was the same person meant in both.

2 Hawk.
P. C. c. 35.
§ 3.

If a person killed be described by his proper name and surname in the first indictment, and by a different surname in the second, such variance may also be helped by an averment, that the person so differently named was one and the same person; to which it is advisable to add, that he was known as well by the name in the first, as by that in the second indictment.

2 Hawk.
P. C. c. 35.
§ 3.

If a defendant appear *gratis*, and by attorney, to an information, he may plead a misnomer in abatement, as well as if he had appeared in person; for if he be not the person intended, his plea may be rejected, and judgment signed by *nihil dicit*; but the attorney general, by accepting his plea, admits him to be the defendant, and shall not afterwards say, that it doth not appear but that the plea might be put in by a stranger.

2 Hawk.
P. C. c. 34.
§ 3.

Letw. 36.

One defendant cannot plead misnomer of his companion; for the other defendant may admit himself to be the person in the writ.

2 Hal. Hist.
P. C. 177.

So, if several persons be indicted for one offence, misnomer, or want of addition of one, quasheth the indictment only against him, and the rest shall be put to answer; for they are in law as several indictments.

Monopoly.

(A) Monopoly, what it is, and how restrained by the Common Law.

(B) How restrained by Statute.

(A) Monopoly, what it is, and how restrained by the Common Law.

3 Inst. 181.
Noy, 182.
(a) Monopoly and engrossing differ only in this, that the first is by patent from the

A Monopoly is described by my Lord Coke to be an institution or allowance by the king by his (a) grant, commission or otherwise, to any person or persons, bodies politick or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politick or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade.

king, the other by act of the subject, between party and party; but are both equally injurious to trade, and the freedom of the subject, and therefore are equally restrained by the common law. Skin. 169.

Hawk. P. C.
c. 79. § 2.
Townsend's
Collection
of Proceedings in
Parliament,
244, 245.
(b) And it is held to be

And therefore all grants of this kind, relating to any known trade, are made (b) void by the common law, as being against the freedom of trade, discouraging labour and industry, restraining persons from getting an honest livelihood by a lawful employment, and putting it in the power of particular persons to set what prices they please on a commodity; all which are manifest inconveniencies to the publick.

further restrained by the common law, by subjecting those who are guilty thereof to a fine and imprisonment for the offence, as being *malum in se*, and contrary to the ancient and fundamental laws of the kingdom; and it is said, that there are precedents of prosecutions of this kind in former days.

3 Inst. 181. 2 Inst. 47. 61.

And

And upon this ground it hath been resolved, that the king's grant to any particular corporation, of the sole importation of any merchandize, is void, whether such merchandize be prohibited by statute or not.

Hence also it seems, that the king's charter, empowering particular persons to trade to and from such a place, is void, so far as it gives such persons an exclusive right of trading, and debarring all others. And it seems now agreed, that nothing can exclude a subject from trade, but an act of parliament.

Skin. 165. pl. 2. 226. 234.

Also, it hath been adjudged, that the king's grant of the sole making, importing, and selling of playing cards, is void; notwithstanding the pretence, that the playing with them is a matter merely of pleasure and recreation, and often much abused, and therefore proper to be restrained; for since the playing with them is, in itself, lawful and innocent, and the making of them an honest and laborious trade, there is no more reason why any subject should be hindered from getting his livelihood by this than any other employment.

And for the like reasons also it hath been resolved, that the grant of the sole engrossing of wills and inventories in a spiritual court, or of the sole making of bills, pleas, and writs in a court of law, to any particular person, is void. Vern. 120. 130. 10 Mod. 107.

But it seemeth clear, that the king may, for a reasonable time, make a good grant to any one of the sole use of any art invented, or first brought into the realm, by the grantee.

Also, it seems to be the better opinion, that the king may grant to particular persons the sole use of some particular employments; (as of (a) printing the Holy Scriptures, and law books, &c.) whereof an unrestrained liberty might be of dangerous consequence to the publick.

one. (a) The reasons hereof given are, that the invention of printing was new; that it concerned the state, and was matter of publick care; that it was in the nature of a proclamation, and none could make proclamations but the king; that as to law-books, the king has the making of judges, serjeants, and officers of law; that they are printed in a particular language and character, with abbreviations, &c. Vide 2 Chan. Ca. 67. Skin. 234.

(B) How restrained by the Statute.

BY the 21 Jac. 1. c. 3. it is declared and enacted, "That all
" monopolies, and all commissions, grants, licences, charters
" and letters patents to any person or persons, bodies politick or
" corporate whatsoever, of or for the sole buying, selling, making,
" working, or using of any thing within this realm, or *Wales*, or
" of any other monopolies. and all proclamations, inhibitions,
" restraints, warrants of assistance, and all other matters whatsoever,
" any way tending to the instituting, strengthening, furthering,
" or countenancing of the same, or any of them, are
" altogether contrary to the laws of this realm, and so are and
" shall

“ shall be utterly void, and of none effect, and in nowise to be put in ure and execution.”

And § 2. “ That all persons, bodies politick and corporate whatsoever, shall be disabled and incapable to have, use, exercise, or put in ure any monopoly, or any such commission, grant or licence, &c., or other thing tending as aforesaid, or any liberty, power, or faculty, grounded or pretended to be grounded upon them, or any of them.”

(a) In the construction hereof it is held by my Lord Coke, that all matters of this kind ought

And it is further declared and enacted, by § 3. “ That all monopolies, and all such commissions, grants, and licences, &c., and all other things tending as aforesaid, and the force and validity of them ought to be, and shall be examined, heard, tried, and determined by and according to the (a) common laws of this realm, and not otherwise.”

to be tried in the courts of common law only; and not at the Council-table, or in the court of Chancery, or any other court of like nature. 3 Inst. 182. But for this wide jurisdiction of the Court of Chancery, *ut*. Courts and their Jurisdiction.

And it is further enacted, by § 4. “ That if any person shall be hindered, grieved, disturbed, or disquieted, or his goods or chattels any way seized, attached, distrained, taken, carried away, or detained by occasion or pretext of any monopoly, or of any such commission, grant, or licence, &c., or other matter or thing tending as aforesaid, and will sue to be relieved in any of the premises, he shall have his remedy for the same at the common law, by action grounded on the said statute, to be heard and determined in the King’s Bench, Common Pleas, or Exchequer, against the party by whom he shall be so hindered or grieved, &c., or by whom his goods shall be so seized or attached, &c., wherein every such person, which shall be so hindered or grieved, &c., or whose goods shall be so seized or attached, &c., shall recover three times so much as the damages which he sustained by means of such hinderance, &c., and double costs; and in such suits, or for the staying or delaying thereof, no essoin, protection, wager of law, aid-prayer, privilege, injunction, or order of restraint, shall be in anywise prayed, granted, admitted, or allowed, nor any more than one imparlance; and if any person shall, after notice that the action depending is grounded upon the said statute, cause or procure any action at the common law grounded thereon to be staid or delayed before judgment, by colour or means of any order, warrant, power, or authority, save only of the court wherein such action shall be depending; or after judgment shall cause or procure the execution to be staid or delayed by colour or means of any order, warrant, prayer, or authority, save only by writ of error or attaint, that then the said person or persons so offending shall incur a *præmunire*.”

3 Inst. 183.

It is said, that the first branch of this last clause, relating to the delay of causes of this kind before judgment, not only extendeth to the Privy Council, Chancery, Exchequer-chamber, and the like, but also to those who shall procure any warrant from the king for such

such purpose ; and it is said, that the latter branch, relating to the delaying of execution after judgment, extendeth even to the judges of the court where the cause is depending.

But it is provided, by § 6. “ That no declaration, in the statute mentioned, shall extend to any letters patents, and grants of privilege for the term of fourteen years, or under, of the sole working or making of any manner of (a) new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others, at the time of making such letters patents and grants, shall not use; so as also they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters patent, or grant of such privilege, but that the same should be of such force, as they should be if the said act had never been made, and of none other.”

(a) Manufactures newly brought into the realm from beyond sea are included, though they had been long practised there before; for the statute speaks of new manufactures

within this realm, and was made to encourage new devices useful to the kingdom; and whether learned by travel or study, it is the same thing. 2 Salk. 447.

It hath been resolved, that no new invention, concerning the working of any manufacture, is within the meaning of this exception, unless it be substantially new, and not barely an additional improvement of an old one. 3 Inst. 184.

Also, it hath been holden, that a new invention to do as much work in a day by an engine, as formerly used to employ many hands, is not within the said exception; because it is inconvenient, in turning so many labouring men to idleness. 3 Inst. 184.

Also, it seems clear, that no old manufacture, in use before, can be prohibited in any grant of the sole use of any such new invention. 3 Inst. 184.

And it is farther provided, § 7. “ That nothing in the said act contained shall extend to any grant or privilege, power or authority whatsoever, before the said act made, granted, allowed, or confirmed by any act of parliament, so long as the same shall continue in force.”

Provided also, § 9. “ That nothing in the said act contained shall be in anywise prejudicial to any city, borough, or town corporate within this realm, concerning any grants, charters, or letters-patent to them made, or concerning any custom used by or within them, or unto any corporations, companies, or fellowships of any art, trade, occupation, or mystery, or to any companies or societies of merchants within this realm, erected for the maintenance, enlargement, or ordering of any trade or merchandize, but that the same charters, customs, corporations, &c. and their liberties and immunities, shall be of such force and effect, as they were before the making of the said act, and of none other; any thing before in the said act contained to the contrary in anywise notwithstanding.”

And it is further provided, § 10. “ That nothing in the said act contained shall extend to any letters-patent, or grants of privilege

“ privilege concerning printing, nor to any commission, grants, or
 “ letters-patent concerning the digging, making, or compound-
 “ ing of salt-petre, or gunpowder, or the casting or making of
 “ ordnance, or shot for ordnance; nor to any grant or letters-
 “ patent of any office, erected before the making of the said
 “ statute, and then in being and put in execution, other than such
 “ offices as had been decreed by proclamation; but that all such
 “ grants, &c. shall be of the like force and effect, and no other,
 “ as if the said act had never been made.”

But it is enacted, by 16 *Car. 1. c. 21.* “ That it shall be lawful
 “ for all persons, as well strangers as natural-born subjects, to
 “ import any quantities of gunpowder whatsoever, paying such
 “ customs and duties for the same as by parliament shall be
 “ limited; and that it shall be lawful for all his majesty’s subjects
 “ of this realm of *England*, to make and sell any quantities of
 “ gunpowder at his pleasure, and also to bring into this kingdom
 “ any quantities of salt-petre, brimstone, or any other materials
 “ for the making of gunpowder; and that if any person shall put
 “ in execution any letters-patent, proclamations, edict, act,
 “ order, warrant, restraint, or other inhibition whatsoever, where-
 “ by the importation of gunpowder, salt-petre, brimstone, or other
 “ the materials aforementioned, shall be any ways prohibited or
 “ restrained, he shall incur a *præmunire*.”

And it is further provided by the said statute of 21 *Jac. 1. c. 3.*
 § 11, 12. “ That nothing in the said act contained shall extend to
 “ any commission or grant concerning the digging, compounding,
 “ or making of alum or alum mines, &c., nor concerning the
 “ licensing of the keeping of any tavern or selling of wines, to be
 “ spent in the mansion-house, or other place in the tenure or oc-
 “ cupation of the party selling the same; and a further provision
 “ is made in the latter part of the statute, for some particular
 “ grants to particular corporations and persons, as *Newcastle-upon-*
 “ *Tine*,” &c.

3 *Inst.* 185. But it is said, that the said clause relating to alum was needless,
 because all such mines belong of course to the persons in whose
 grounds they are, and therefore no privilege concerning them can
 be granted but in the king’s own ground.

[See farther tit. “*Prerogative*.”]



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